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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,
Petitioner,

v.

JANET MILLER-JENKINS,
Respondent.

On Petition for Writ of Certiorari to the
Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Parental Kidnaping Prevention Act, which affords custody and visitation orders full faith and credit, or the later-enacted Defense of Marriage Act, which does not require full faith and credit be afforded to rights arising from same-sex unions treated as marriage, controls when a receiving state, whose laws expressly declare the same-sex union "void in all respects," is asked to give full faith and credit to custody orders arising from a same-sex union.

2. Whether the jurisdictional preference provided in the PKPA to the first state issuing a custody determination consistent with the PKPA deprives a second state from issuing a parentage determination where the custody determination arose from a same-sex civil union and the second state, pursuant to the federal Defense of Marriage Act, has expressly adopted laws refusing recognition of rights or claims arising from same-sex unions.

3. Whether an award of parentage rights to a legal stranger, over the objections of a fit, biological parent, infringes the constitutional rights of a fit parent.

4. Whether a receiving state is required to give full faith and credit to sister state's custody order that violates the federal parental rights of the

biological mother, when the receiving state is where the mother conceived and gave birth to the child and continues to live with the minor child.

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OPINIONS BELOW

The opinion of the Virginia Supreme Court is reported at 661 S.E.2d 822. (App. 1a-13a). The order of the Virginia Court of Appeals is unreported. (App. 14a-16a). The order of the Circuit Court is unreported. (App. 17a-21a). The order of the J&DR court is unreported. (App. 22a-27a).

JURISDICTION

The opinion of the Virginia Supreme Court was filed on June 6, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Fourteenth Amendment to the United States Constitution; the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A (PKPA); the Defense of Marriage Act, 28 U.S.C. § 1738C (DOMA); 15 V.S.A. 1204; the Virginia Constitution, article I, § 15-A; and Va. Code §§ 20-45.3 and 20-158. The constitutional and statutory provisions involved are each set out, in relevant part, verbatim with appropriate citations in Appendices L through R. (App. 142a-159a).

STATEMENT OF THE CASE

This case presents two related, but independent, substantial federal issues: the sovereignty of one state to refuse to give full faith and credit to court orders resulting from a sister state's recognition of a same-sex union treated as marriage, and whether a reviewing court must give deference to the fundamental right of a fit, biological parent to decide whether a legal stranger should be treated as a parent to her child.

First, this case concerns the clash between two conflicting state laws and the application of the Parental Kidnaping Prevention Act (PKPA), which requires one state to give full faith and credit to custody orders of a sister state, and the Federal Defense of Marriage Act (DOMA), which exempts states from extending full faith and credit to a sister state's same-sex marriage or union treated as marriage. Vermont authorizes same-sex civil unions. Virginia does not recognize such unions or any right or claim arising from such unions. The PKPA generally requires one state to recognize a sister state's custody order, but Virginia law forbids any recognition arising out of a sister state's same-sex union law. DOMA gives Virginia that right. The question of whether the PKPA or DOMA controls – whether they are in conflict or are complementary – is at issue here.

Second, this case also involves the statutory and fundamental constitutional rights of Petitioner, Lisa Miller (Lisa), the fit, biological mother of six year old Isabella, to decide whether Respondent, Janet

Jenkins (Janet), who has no biological or adoptive relationship to Isabella, should be treated as a parent to Lisa's child, over Lisa's objections. The lower courts afforded no deference to Lisa's parental choice.

In December 2000, while Virginia residents, Lisa and Janet traveled to Vermont to obtain a same-sex civil union and immediately returned to Virginia. (App. 28a). In 2001, Lisa was artificially inseminated in Virginia, by a Virginia doctor, with sperm from an anonymous donor. (App. 28a). Janet did not provide any genetic material for the insemination. (App. 125a).

Lisa gave birth to Isabella in Virginia in April 2002 and is the sole parent on Isabella's Virginia birth certificate. In August 2002, all three moved to Vermont. (App. 29a). *Janet never adopted Isabella, even though Vermont law permitted her to do so.* (App. 125a). When the relationship ended thirteen months later, Lisa returned home to Virginia with Isabella; Janet remained in Vermont. (App. 29a).

In November 2003, Lisa *pro se* filed forms in Vermont to dissolve her civil union. (App. 29a). Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid.[1] Virginia law, then and now, prohibited same-sex unions. The *pro se* complaint form asked whether there were "biological

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[1] *See, e.g., Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002) (Connecticut lacked jurisdiction to dissolve Vermont civil union because Connecticut law did not recognize civil unions).

or adoptive children of said civil union." Lisa listed Isabella in response to that question because she gave birth to Isabella during the civil union. Janet counterclaimed, seeking full custody of Lisa's biological child, without any allegation that Lisa was an unfit mother.

On June 17, 2004, Vermont issued a "temporary order re: parental rights and responsibilities" (the "Temporary Custody Order") (App. 113a). The order awarded Lisa "legal and physical responsibility" for Isabella, and, over Lisa's objection, without deciding whether Janet was a parent to Isabella, granted Janet temporary "parent child contact." (App. 114a). Lisa was ordered to give Janet one week each month of unsupervised visitation with then two-year old Isabella in Vermont beginning in August 2004.[2] (*Id.*).

On July 1, 2004, Lisa filed a petition in Virginia, asking the court to declare her Isabella's sole parent under Virginia's assisted fertilization statute (the "Parentage Case"). On September 9, 2004, a Virginia circuit court found that nothing in the PKPA precluded it from exercising jurisdiction over a *parentage* action, as distinct from a custody proceeding. (App. 31a). In addition, the court found: "Any claim of parentage by Respondent under Vermont law is necessarily based on Respondent's

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[2] A subsequent final order granted Lisa sole legal and physical responsibility, with liberal visitation to Janet. That order cautioned that custody could be awarded to Janet if Lisa did not foster a good relationship between Isabella and Janet.

civil union with Petitioner," and any such rights are null and void under Virginia law. On October 15, 2004, that court entered final judgment of sole parentage in Lisa's favor. (App. 31a). Janet appealed.

One month later, the Vermont family court belatedly declared Janet a parent to Isabella. After explaining that "Vermont has not yet been presented with the question of parental status concerning a child born during a marriage [or civil union] and conceived through artificial insemination," *the court created a new parentage rule and applied it retroactively.* It declared that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and to raise the child as one's own as part of a family unit, not by biology." (App. 133a). On December 21, 2004, the Vermont trial court refused to give full faith and credit to the Virginia parentage order, which was entered one month *before* the Vermont court reached the issue. The Vermont Supreme Court affirmed the district court's parentage and visitation rulings and remanded the case to finally determine custody and visitation. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951 (2006).[3]

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[3] On remand, the family court treated Lisa's defenses and arguments raising federal parental rights as having been conclusively determined against her and issued a final custody order that granted Janet parentage rights. The Vermont Supreme Court affirmed. A petition for certiorari

After briefing was completed to the Virginia Court of Appeals in the Parentage Case, in March 2005, Janet sought to register, but not enforce, the Vermont temporary order in Virginia (the "Registration Case"). On August 8, 2005, the Juvenile & Domestic Relations court registered the order. (App. 22a). On March 1, 2006, the circuit court reversed, concluding that Virginia law prohibited registration of the order. (App. 17a).

On November 28, 2006, the Virginia Court of Appeals reversed the circuit court's decision in the Parentage Case. Resting entirely on its interpretation of two federal statutes, the court concluded that, despite Virginia's prohibition against recognizing any rights flowing from same-sex unions, "*the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court.*" (App. 46a) (emphasis added). The court rejected Lisa's argument that "DOMA . . . effectively trumps the PKPA" with respect to custody orders arising out of same-sex relationships treated as marriage. (App. 42a). The court did not address Lisa's parental rights argument. A motion for rehearing *en banc* was denied.[4]

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was filed with this court on August 11, 2008. *See* U.S. No. 08-178.

[4] On May 7, 2007, the Virginia Supreme Court dismissed Lisa's petition for appeal in the Parentage Case. Virginia Supreme Court Rules state that those with a *right* to petition for appeal must file a Notice of Appeal. Because

Relying on the reasoning of its decision in the separate Parentage Case, on April 17, 2007, the Virginia Court of Appeals summarily vacated the March 1, 2006 circuit court order in the Registration Case, remanding with instructions to register the Vermont temporary order. (App. 16a) ("In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case.").

On June 6, 2008, the Virginia Supreme Court affirmed the court of appeals' decision in the Registration Case, refusing to reach the merits because it determined that the lower court's November 2006 decision in the *Parentage* Case was law of the case as to all issues raised in the *Registration* Case. (App. 12a).[5] Chief Justice Hassell,

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Lisa did not have a right to petition for appeal, she filed a petition for appeal without a notice of appeal. The clerk later informed Lisa that a Notice of Appeal should have been filed with the Court of Appeals despite the plain language of Virginia Supreme Court Rules 5:14 and 5:17, which state that pursuant to Va. Code § 17.1-410 Appellant has *no right to petition* for appeal to the Supreme Court *unless* the "Court determines that the petition involves a substantial constitutional question as a determinative issue or matters of precedential value . . . ." Va. Code § 17.1-410(B). The court dismissed the petition for lack of a *notice* of appeal even though a *petition* for appeal was timely filed.

[5] As explained below, Point III, this Court can, and should, "consider all of the substantial federal questions determined in the earlier stages of the litigation," despite

while concurring in the judgment regarding law of the case, noted that on the merits, the court of appeals decision in the Parentage Case was incorrect.

This Virginia Supreme Court decision affirming the court of appeals' decision in the Registration Case, which expressly relied on the reasoning of the court of appeals' order in the Parentage Case, is the subject of this Petition. This Court should grant *certiorari* and reverse on the merits.

Federal Questions Presented in State Proceedings

The decision below rests *entirely* on an improper interpretation of the scope and application of two federal statutes – the PKPA and DOMA. When the PKPA and DOMA are properly construed, Virginia, which expressly refuses to recognize same-sex marriages or unions or any rights arising therefrom, is not required to give full faith and credit to a Vermont custody or parentage order that is based on its same-sex civil union law concerning a child conceived and born in Virginia to a Virginia resident.[6]

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the Virginia Supreme Court decision that the decision in the Parentage Case became law of the case in the Registration Case. Reece v. Georgia, 350 U.S. 85, 87 (1956).

[6]Attorneys General for the states of Virginia and Michigan separately submitted to the Virginia Supreme Court *amici* briefs in Lisa's favor.

Virginia is also not required to register the Vermont custody determination because that determination infringes Lisa's fundamental rights as a fit, biological parent to direct the upbringing of her child. Lisa pressed this argument in her Motion to Oppose Registration to the J&DR court, in her briefs on appeal to the circuit court (App. 18a), in her response brief to the Virginia Court of Appeals, and in her briefs to the Virginia Supreme Court. (App. 6a). She also pressed this argument in the Parentage Case. Despite being raised in every Virginia court, no court, in either the Parentage or the Registration Case, has ever addressed the argument.

REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. First, this case involves an important question of federal law that has not been, but should be, decided by this Court concerning the scope and effect of two federal statutes: DOMA and the earlier-enacted PKPA, both of which are located in the same section of Title 28 of the United States Code. *See* 28 U.S.C. §§ 1738A (PKPA) and 1783C (DOMA). And second, this case presents the question of the constitutional rights of fit parents to exclusive control over custody and visitation of their children, a question over which the lower courts are split.

DOMA recognizes state sovereignty under the Full Faith and Credit Clause (FFC) so that one state is not directly or indirectly compelled by a sister state to recognize same-sex marriage, same-sex relationships treated as marriage, or any rights

arising therefrom. Confusion over the PKPA and DOMA caused the courts below to declare that Virginia *had no choice* but to give full faith and credit to Vermont. Yet, Virginia's constitution and statutory law expressly prohibit recognition of any rights arising from same-sex unions. (App. 142a, 157a).

In passing DOMA, Congress invoked its authority under the FFC to prescribe "what (if any) effect" states must give to "any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same-sex that is treated as marriage under the laws of such other state . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C; H.R. Rep. 104-664, at 27, 1996 U.S.C.C.A.N. 2905, 2932. DOMA, which was passed by an overwhelming majority and signed into law in 1996, provides that each state can determine what legal effect to give to: (a) same-sex marriages or same-sex relationships treated as marriage, but not called marriage; and (b) rights or claims arising from those same-sex marriages or relationships.

Forty-five states have enacted laws or passed constitutional amendments prohibiting legal recognition of same-sex unions.[7] Confused over the scope and effect of the PKPA, the lower courts eviscerated the protections afforded Virginia under DOMA and Virginia law by interpreting the PKPA to impose a *per se* obligation to give full faith and credit

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[7] Arizona, California, and Florida have initiatives on the November ballot to amend their constitutions to recognize marriage as only between one man and one woman.

to parentage and child custody determinations even where such rights arise from a same-sex relationship treated as marriage and deemed void under Virginia law. The PKPA's scope, however, is not that expansive.

The PKPA does not require a state to give full faith and credit to orders arising from a same-sex civil union treated as marriage when the receiving state's laws declare those rights void in all respects. This Court should resolve the important federal questions concerning the proper interpretation of the PKPA and DOMA to prevent further interstate conflicts in matters of traditional state concern. *See infra* Part I.

The writ should also be granted to resolve a pervasive split among the states on the scope of federal constitutional parental rights after *Troxel v. Granville*, 530 U.S. 57 (2000). At least sixteen states, including Vermont in Lisa's case, have judicially appointed *de facto* or psychological parents over the objections of fit, biological parents in the process, rejecting or wholly ignoring federal constitutional claims of parentage rights. At least thirteen states have reached the opposite conclusion on the scope of parents' federal constitutional rights to exclusive control over custody and visitation decisions. The important question of federal law concerning the rights of fit, biological parents in the face of claims of *parentage rights*, by third parties should be settled by this Court. To the extent the Vermont order violated Lisa's parental rights by failing to give *any* deference to Lisa's preferences, Virginia should not be required to register it as a valid order.

It bears emphasis that the case is *not* a domestic relations case. Lisa does not ask this Court to issue a divorce decree, decide custody, or award alimony. Rather, Lisa asks the Court to clarify the scope and effect of the PKPA and DOMA in order to prevent further interstate conflicts involving custody of young children.[8] Confusion over these two federal statutes has embroiled Virginia and Vermont in more than four years of litigation, most of which could have been avoided with guidance from this Court on the proper interpretation of the federal statutes and constitution. Given the increasing number of states treating same-sex unions as marriage, expressly prohibiting recognition of those unions, or declaring third parties *de facto* parents, the federal issues presented are of nationwide significance and urgency.

I.

THE DECISION BELOW EVISCERATES THE PROTECTIONS AFFORDED BY DOMA.

A. The Virginia Courts Mistakenly Concluded that the PKPA Made Child Custody Determinations Arising from

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[8] Although this case does not present an "intractable jurisdictional deadlock[]," review should nevertheless be granted. *See Thompson v. Thompson*, 484 U.S. 174, 187 (1988). The case involves an important, likely recurring, question of federal law that needs to be settled.

a Same-Sex Civil Union Exempt from, Instead of Subject to, DOMA.

Virginia exercised its sovereign right to enact via constitution and statutory law the strongest prohibition in the nation against recognition of same-sex civil unions and rights arising therefrom. According to the decisions below, however, the PKPA imposes a *per se* obligation to give full faith and credit to custody orders arising from a Vermont same-sex civil union, regardless of how offensive the Vermont order is to Virginia law.

Because of the confusion over the PKPA, Virginia courts concluded that the PKPA required Virginia to substitute Vermont's laws for Virginia's laws that expressly prohibit recognition of same-sex civil unions. The PKPA does not nullify the later-enacted DOMA and override the sovereignty of states with respect to same-sex marriage or unions, or rights arising therefrom.

Rather, the PKPA requires states to treat child custody orders *the same* as other final orders for purposes of the full faith and credit obligation, subject to any then-existing or yet-to-be created exceptions. *See* S. Rep. 103-361, at 4, 1994 U.S.C.C.A.N. 3259, 3261; *see also Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Mason v Mason*, 775 N.E.2d 706, 709 & n.3 (Ind. Ct. App. 2002) (stating general rule that courts will give full faith and credit to marriage validly contracted in the place where it is celebrated, unless it violates strong public policy); Ala. Op. Att'y Gen. No. 2000-129, 2000 WL 33310632, at *7 (Apr. 20, 2000) ("the Full Faith and

Credit Clause would not require the State of Alabama . . . to recognize any form of homosexual 'marriage' that might be conducted in the future under the laws of the state of Vermont, whether the relationship were legally styled a 'marriage,' a 'civil union,' or a 'domestic partnership.'") *cf. Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (Congress enacted the PKPA in 1980 because some courts doubted whether custody orders were sufficiently "final" to trigger the full faith and credit requirement).

This Court has explained the fact that PKPA is an addendum to the FFC Act is itself "strong proof" Congress intended child custody orders to have the *same* operative *effect* as other acts, records, and judicial proceedings that fall within the mandate of the FFC Act. Indeed,

> it seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.

Thompson, 484 U.S. at 183; *cf. id.* at 187 ("state courts faithfully administer the full faith and credit clause every day; now that Congress has extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant."). The PKPA, thus, does not

create an *exception* requiring a wooden, *per se* full faith and credit obligation s for child custody and visitation orders.

B. The Virginia Courts Ignored the Fact that DOMA Codified a State's Sovereign Power to Define and Regulate Marriage and Family.

In 1996, an Hawaii court considered whether to redefine marriage to include same-sex marriage, Congress passed DOMA to prevent one state from forcing other states to treat same-sex unions as valid. Congress relied on longstanding Supreme Court precedent to reach its conclusion that, even without DOMA, each state had the sovereign power to determine what, if any, legal *effect* to give to same-sex relationships from sister states. Congress invoked its authority under the FFC to prescribe "what (if any) effect" states must give to same-sex unions. 28 U.S.C. § 1738C; H.R. Rep. 104-664, at 27, 1996 U.S.C.C.A.N. 2905, 2932. DOMA provides that

> No State . . . shall be required to *give effect* to any public act, record, or judicial proceeding of any other State . . . *respecting* a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim *arising from* such relationship.

28 U.S.C. § 1738C (emphasis added).

DOMA recognizes that "domestic relations are preeminently matters of state law." *See Elk Grove*, 542 U.S. at 12. The powers retained by the states

under our Constitution "are numerous and indefinite . . . . The powers reserved to the several states . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state." The Federalist, No. 45, at 289 (Clinton Rossiter, ed. 1961). In contrast, "[t]he powers delegated . . . to the federal government are few and defined. . . . [The federal powers] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." *Id.* Given this division of powers, it is no surprise that this Court has explained that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987). Codifying a State's sovereignty over domestic relations matters, Congress passed DOMA.

A House Report from the Judiciary Committee confirms that Congress passed DOMA to remove any doubt about a state's power to refuse to give full faith and credit to a sister state's order that would undermine the receiving state's power to define marriage and family for itself.

> [W]e simply cannot know exactly how courts will rule on the Full Faith and Credit Clause issue. As a result, we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States. While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to

> same-sex marriages celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

H.R. Rep. 104-664 at 24, 1996 U.S.C.C.A.N at 2929.

Congress further clarified that it was concerned about much more than whether a marriage or civil union license would be valid in a second state.

> In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got "married," returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian "marriage" license. . . . In general, the Committee believes that at least two things would occur.
>
> First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. . . . Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of governmental marital benefits. For example, in *Baehr v. Lewin*, the court listed fourteen specific "rights and benefits" that are available only to married couples (listing benefits related to income tax; public assistance; community property; dower, courtesy [sic], and inheritance; probate; ***child custody*** and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce

rights; evidentiary privileges; and others).[9]

Id. at n.21 (emphasis added) (citations omitted).

In passing DOMA, Congress clarified the scope of a state's sovereign power to define and regulate domestic relations matters involving same-sex unions. Nothing in the *earlier enacted* PKPA exempts it from application of DOMA's specific instructions that no state is required to give effect to rights arising from a same-sex relationship in contravention of the state's constitution and laws prohibiting recognition of any such rights.

C. Absent Intervention from this Court, a Handful of States Will Set Marriage Policy for the Nation, in Contravention of the Express Will of Congress.

Vermont treats same-sex civil unions the same as marriage. Under DOMA, no state is required to give full faith and credit to any rights or claims arising from a Vermont same-sex civil union. 28 U.S.C. § 1738C. Rather, each state is free to make its own determination concerning the effect it will give to rights afforded same-sex unions. If other courts follow the Virginia Courts' lead, however, DOMA will be rendered meaningless as to a state's sovereignty to

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[9] The court of appeals inexplicably stated that "[n]othing in the wording or legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations." (App. 44a).

define who is a parent.

That result is especially egregious given Virginia's express public policy against any recognition of same-sex relationships. Virginia's Marriage Affirmation Act (MAA) provides that:

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction ***shall be void in all respects*** in Virginia and any contractual rights created thereby shall be void and unenforceable.

Va. Code § 20-45.3 (emphasis added). The Virginia Marriage Amendment, effective January 2007, also provides, in relevant part that:

> This Commonwealth . . . shall not create or recognize a legal status for relationships of unmarried individuals that ***intends to approximate*** the design, qualities, significance, or ***effects of marriage***. Nor shall this Commonwealth or its political subdivisions create or ***recognize another union***, partnership, or other legal status to which is assigned the ***rights, benefits***, obligations, qualities, ***or effects of marriage***.

Va. Const. art. I, § 15-A (emphasis added).

Virginia law does not carve out any exceptions – any and all rights, benefits, and obligations flowing from same-sex marriage or a same-sex civil union are void. Vermont same-sex civil unions fall squarely

within the scope of DOMA and Virginia's marriage laws. *See* 15 V.S.A. § 1204(a) (Vermont law states that "parties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage").

In Virginia, the Vermont custody and parentage order is void because the parentage rights granted to Janet under that order are inextricably tied to the underlying civil union. *See Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 912 A.2d 951, ¶ 56 (2006) ("[m]any factors are present here that support a conclusion that Janet is a parent, including, ***first and foremost***, that Janet and Lisa were in a valid legal union at the time of the child's birth"; "the couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage" (emphasis added)). The trial court order made the point more explicitly when it adopted a new rule to determine parentage of any child born by assisted reproductive technology: "where a ***legally connected*** couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit." (emphasis added) (App. 131a-133a).

The decision that Virginia must give full faith and credit to the Vermont custody order highlights the confusion that exists over the scope and effect of the PKPA and DOMA. The court of appeals asked only whether DOMA repealed by implication the mandate of the PKPA to give full faith and credit to custody determinations. (App. 42a-43a). It never considered

the key question of whether the PKPA exempted child custody orders from any then-existing or later-enacted exceptions to the full faith and credit obligation, including the specific exception codified in DOMA. (App. 45a).

The results of this misunderstanding are not only far-reaching but illogical, rendering DOMA virtually meaningless. Absent intervention by this Court, the full faith and credit obligation will incorrectly be interpreted to require sister states to give full faith and credit to a variety of orders, despite strong, express, public policy to the contrary, including adoption decrees, parentage orders, custody determinations, nuptial agreements, spousal support payments, and child support payments.

When, as here, a federal statute is incorrectly interpreted by state courts to usurp a state's power to regulate the most intimate of domestic relations matters, contrary to the express will of Congress, federal courts must intervene to restore the proper balance of powers. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Intervention by this Court is necessary to restore to states their power to define *within their borders* what is marriage and who is a parent.

This Court should grant the petition to resolve the interplay between the PKPA and DOMA where courts address parentage, custody, and other rights arising under one state's same-sex marriage or union law when the law and policy of an affected sister state prohibits recognition of same-sex unions.

II.

A PERVASIVE CONFLICT EXISTS AMONG THE STATES CONCERNING THE PARENTAL RIGHTS OF FIT, BIOLOGICAL PARENTS.

A significant conflict exists among the state courts regarding the fundamental rights of a fit, biological parent to prevent a court from granting parental rights over her child in favor of a legal stranger. Vermont's decision to grant parental rights to a legal stranger highlights the pervasive split among the states concerning the rights of fit, biological parents. Courts in at least sixteen states have ignored or rejected federal constitutional parentage rights' claims pressed by biological parents in the face of claims to *parentage* rights by third parties, declaring the third parties *de facto* or psychological parents. When the court of appeals ordered Virginia to register the Vermont order, it became a "valid" Virginia custody order even though Vermont unconstitutionally treated Janet as a parent to Lisa's child because it *failed to engage in any constitutional analysis or afford the biological parent's preference any weight*. (App. 51a).

Ironically, Virginia is now required to register the Vermont order even though Virginia is one of at least thirteen states that have refused to grant parentage rights to *de facto* parents who have no legal relationship to the child. Virginia has repeatedly affirmed the constitutional rights of fit, biological parents to direct the upbringing of their children. *See*

Stadter v. Siperko, 661 S.E.2d 494 (Va. Ct. App. 2008) (refusing to grant visitation rights to former same-sex partner over the objections of a fit, biological parent); *see also Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007)(*de facto* parent doctrine interferes with a parent's constitutional right to direct the upbringing of her child).

In the past three years alone, appellate courts in at least seventeen states have wrestled with the fundamental rights of parents in third-party custody or visitation cases – fourteen of which involved disputes between same-sex couples.[10]

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[10] *See, e.g., Elton H. v. Naomi R.*, 119 P.3d 969 (Alaska 2005); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (child support obligation imposed against former partner in same-sex relationship); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (lesbian who donated her ova to her partner and later sought custody was determined to be a parent under the UPA); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (biological mother estopped from attacking the validity of a stipulated judgment that declared both her and her ex-lesbian partner to be parents); *Fish v. Fish*, 939 A.2d 1040 (Conn. 2008); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. 2005) (transsexual male sought custody over biological mother's objection); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (former partner in same-sex relationship sought custody over biological mother's objections); *B.F. v. T.D.*, 194 S.W.3d 310 (Ky. 2006) (same); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (same); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008)(same); *McDermott v. Dougherty*, 869 A.2d 751 (Md.

This Court should grant the petition to clarify the rights of fit, biological parents after *Troxel v. Granville*, 530 U.S. 57, 98 (2000), in the face of claims to *parentage* rights by legal strangers and to clarify the rights of a state to refuse recognition of orders from sister states that infringe the fundamental parental rights of fit, biological parents.

For nearly 100 years, this Court has protected a parent's liberty interest in making decisions concerning a child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." Id..

2005); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (upheld constitutionality of third party visitation statute and affirmed decision granting visitation to *in loco parentis* third party over parental objection); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005); *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005) (former partner in same-sex relationship sought custody over biological mother's objection); *Peters v. Costello*, 891 A.2d 705 (Pa. 2005); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007)(former partner in same-sex relationship sought custody over biological mother's objection); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008)(same); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (same); *Clifford K. v. Pauls S.*, 619 S.E.2d 138 (W. Va. 2005) (former same-sex partner of biological mother, father and maternal grandfather all sought custody). *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) (biological parent's former same-sex partner sought custody).

at 65. "It is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Mass.*, 321 U.S. 158, 166 (1944). "The child is not the mere creature of the state . . . ." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Rejecting a claim brought by grandparents seeking visitation with their grandchildren, *Troxel* stated that, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." 530 U.S. at 68-69. Consistent with *Troxel*, Virginia refuses to grant third party visitation rights without a showing of harm to the child. *See Stadter*, 661 S.E.2d at 494 (former same-sex partner sought visitation rights); *see also Craven v. McCrillis*, 868 A.2d 740, 742-43 (Vt. 2005) (grandmother required to present significant evidence of abuse and neglect before court could substitute its judgment for that of fit father, which judgment is presumed valid).

Here, however, Vermont declared Janet a parent *without affording any weight* to Lisa's preferences as the fit, biological mother. (App. 100a). If a third party *visitation* order cannot be granted without a showing of "some special weight," a *parentage* order must be subject to an even more stringent standard. The Vermont orders unconstitutionally interfered with Lisa's decision, as the fit, biological parent, how to

raise her child.[11] Given the manifest constitutional violation, Virginia should not be permitted, much less required, to register it as a valid order.

Courts in Florida, Georgia, Illinois, Iowa,

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[11] What makes this case particularly egregious is the manner in which the Vermont courts ignored existing Vermont law and federal constitutional limitations on its actions to reach a desired result. Under existing law, Janet could only be a parent to Isabella if she had adopted her. The court ignored that law, created new law, and applied it retroactively to a child *born and conceived in Virginia* and then *residing* with her mother *in Virginia*. Vermont also refused to apply its marriage evasion statute equally to same-sex civil union couples or properly apply its own choice of law doctrine because, if it had, the civil union would have been declared void *ab initio*. The evasion statute declares void any marriage entered into in Vermont by non-residents whose home state treats the marriage as void. With no civil union to dissolve, the family court would have had no dissolution proceeding within which even to entertain Janet's counterclaim for parental rights. In addition, Vermont side-stepped application of the factors for its choice of law doctrine on parentage to instead apply its newly-minted law on parentage rather than the law of the state of the child's birth and residence.. By ignoring the settled procedures for determining parentage, Vermont denied Lisa's exclusive parental rights and diminished them. Unsettling historic and settled expectations about the procedure and standards to be used to determine parentage itself infringes upon fundamental parental rights guaranteed by the due process clause of the Fourteenth Amendment.

Maryland, Michigan, New Hampshire, New York, Ohio, Tennessee, Texas, Virginia, and Utah have held that a nonparent does not obtain custodial rights or decision-making authority simply because the nonparent has strong emotional bonds with the natural parent's child, even where such bonds were encouraged and facilitated by the biological parent. *See, e.g.*, *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (nonparent in same-sex relationship sought parental rights); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001) (fit biological parent may not lose custody to a nonparent unless nonparent proves by clear and convincing evidence that the biological parent is unfit or that the parental custody would cause physical or significant, long term emotional harm to the child); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (refusing to recognize a psychological parent right even when the nonparent was called "daddy" by the children he had co-parented since birth); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999) (former same-sex partner was not entitled to visitation); *Petition of Ash*, 507 N.W.2d 400 (Iowa 1993) (former boyfriend not entitled to visitation with biological mother's child); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008) (overruling prior case law adopting *de facto* parent doctrine); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (mother's same-sex partner not entitled to visitation or custodial rights over objection of biological father after biological mother died); *In re Nelson*, 825 A.2d 501 (N.H. 2003) (rejecting claim by nonparent to parental rights over objection of fit, biological

parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (denying visitation request by former same-sex partner over objection of fit, biological parent); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (rejecting claim that same-sex partner was a parent); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (former partner in a same-sex relationship had no claim to visitation); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. Ct. App. 2003) (rejecting claim by same-sex partner for visitation); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (refusing to adopt *de facto* or psychological parent doctrine by judicial fiat); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007)(refusing to extend *in loco parentis* or adopt *de facto* or psychological parent doctrines to permit visitation claim by former same-sex partner visitation). *But see Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508-509 (N.Y. Sup. Ct. 2008) (refusing to follow binding New York precedent, instead finding biological parent is equitably estopped to deny former same-sex partner has standing to seek custody). Until its decision in the litigation between these parties, the Vermont Supreme Court had also refused to recognize custodial rights of third-parties who had not adopted the child, *see Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997), or to judicially expand the definition of parent to include alleged psychological parents, *In re J.M.*, 750 A.2d 442 (Vt. 2000).

On the other hand, at least sixteen states grant rights to *de facto* parents, psychological parents, or people who stand *in loco parentis* to the child, over the federal constitutional objection of the child's fit,

biological or adoptive parent. *See, e.g.*, *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004) (allowing one standing *in loco parentis* to obtain visitation over objections of fit, biological parent); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005) (stepparent granted visitation); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (parental rights granted to former same-sex partner); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (granting former same-sex partner joint parenting time over objection of fit, biological mother); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (affirmed decision granting visitation to *in loco parentis* third party over parental objection); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (finding that biological mother partially relinquished the exclusive right to direct her child's upbringing to her former same-sex partner, requiring the court to decide custody under the best interest of the child analysis); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent stands in parity with biological parent); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (a *de facto* parent has parental rights regardless of *Troxel*); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (a *de facto* or psychological parent stands on equal footing with biological parents for purposes of constitutional analysis); *In re Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995) (four factor *de facto* parenthood test); *Clifford K. v. Paula S.*, 619 S.E.2d 138 (W. Va. 2005) (adopting Wisconsin's *de facto* parent test). *But see Brewer v. Brewer*, 533 S.E.2d 541 (N.C. Ct. App. 2000)

(rejecting claim to *de facto* parent status). Other courts simply ignore the constitutional argument altogether. *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (woman entitled to visitation rights to her former same-sex partner's biological child); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (a *de facto* parent can be awarded parental rights over objections of biological parent); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (enforcing coparenting agreement between lesbian couple); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005) (rights of persons standing *in loco parentis* are the same as those of biological parent).

There are also conflicts among the states as to whether the third party seeking parentage rights over the objections of the fit biological mother must merely demonstrate such a determination is in the best interests of the child or that absent such a determination, some actual harm will befall the child's health and welfare. *Compare In re Parentage of L.B.*, 122 P.3d 161, 171-72 (Wash. 2005) (broad equitable powers to act in accord with welfare of the child); *In re Custody of H.S.H.K.*, 533 N.W.2d 419, 440-42 (Wis. 1995) (courts have equitable power to do what is in the best interest of the child) *with Griffin v. Griffin*, 581 S.E.2d 899, 903 (Va. Ct. App. 2003) (absent showing of actual harm to the child, the constitutional liberty interests of fit parents take precedence over the best interests of the child); *Roth v. Weston*, 789 A.2d 431, 450 (Conn. 2002) (denial of visitation must cause real and significant harm to the child); *Clark v. Wade*, 544 S.E.2d 99, 100 (Ga. 2001)

(to construe custody statute constitutionally, showing of harm to the child is required).

Of course, the constitutional error is manifest in Lisa's case because Vermont sidestepped the difficult constitutional questions by simply declaring Janet to be a co-equal parent with Lisa. As a result, Lisa argued to the Virginia courts that whatever the scope of the full faith and credit obligation under the PKPA, it cannot require Virginia to register a facially unconstitutional order. *See, e.g., Weidner v. W.G.N.*, 371 N.W.2d 379, 381 (Wis. Ct. App. 1985) ("A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. 'We see no reason to accord full faith and credit to a [court-approved paternity agreement] obtained in violation of equal protection.'" (citations omitted)). None of the Virginia courts ever addressed the issue even though Lisa pressed it repeatedly.

It bears mention that this issue is not the exclusive concern of former homosexuals or lesbians resisting their former same-sex partner's parentage claims. Split-ups between current lesbians, for example, or split-ups where the former lesbian is not the biological mother, would raise the same questions of fundamental parental rights. In short, *all* biological parents, regardless of sexual orientation, have a stake in *Troxel* rights.

In light of the growing conflict and confusion among the states concerning the parental rights of fit, biological parents *vis a vis* third parties, this Court should address and resolve the conflict.

III. THE VIRGINIA SUPREME COURT'S LAW OF THE CASE DETERMINATION DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO REACH IMPORTANT FEDERAL ISSUES.

A long line of cases establishes this Court's jurisdiction to consider the substantial federal questions raised by Lisa in the lower courts despite the Virginia Supreme Court's ruling that the court of appeals' decision in the Parentage Case became law of the case as to the matters raised in the Registration Case. This Court said:

> We have jurisdiction to consider all of the substantial federal questions determined in the *earlier stages of state proceedings* and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case.

Reece v. Georgia, 350 U.S. 85, 87 (1955) (citations omitted) (emphasis added).

"The ruling that the former decision of the state court became the law of the case does not affect the power of this court to examine the question." *Davis v. O'Hara*, 266 U.S. 314, 320 (1924); *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990) (though court of appeals had invoked the law of the case, "the earlier panel's ruling does not, of course, bind this Court"); *Christiansen v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review"); *Washington ex rel. Grays Harbor Logging Co. v.*

Coats-Fordney Logging Co., 243 U.S. 251, 257 (1917) ("this court will not be thus bound" by a state court law of the case determination); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (regarding the law of the case in the lower court, "[o]f course, this court, at least, is free when the case comes here.").

This Court's decision in *Davis* is instructive. In that case, defendant appeared specially in the trial court to contest personal and subject matter jurisdiction. The trial court denied the motion. After a jury returned a verdict for defendant, the plaintiff appealed. The Nebraska Supreme Court reversed on the merits, refusing to reach defendant's objection to jurisdiction because defendant failed to file a cross-appeal. On remand, the trial court again overruled defendant's objection to the court's jurisdiction. On appeal to the Nebraska Supreme Court for the second time, the court refused to reach the jurisdictional question, holding that the former trial court decision had become law of the case on that issue.

This Court, however, reversed on the merits of defendant's jurisdictional argument. At the outset, this Court explained that "[t]he ruling that the former decision of the state court became the law of the case does not affect the power of this court to re-examine the question." 266 U.S. at 321. Then this Court reached the merits of the trial court's decision on defendant's objection to personal and subject matter jurisdiction, ultimately reversing the trial court's determination.

As in *Davis*, so too here the state supreme court's determination in the Registration Case that the

matters decided by the court of appeals in the Parentage Case are law of the case (which issues, as in *Davis*, were never addressed by the Virginia Supreme Court on the first appeal because it dismissed the petition on procedural grounds) does not deprive this Court of jurisdiction to reach the substantial federal issues upon which the opinions below are based.[12]

Separately, even if a law of the case determination would normally deprive this Court of jurisdiction, which it does not, Virginia's application of the doctrine below does not constitute an independent and adequate state law ground for the decision. In its June 2008 decision, the Virginia Supreme Court expanded, for the first time, the law of the *case* doctrine to become the law of the *cases*.

As acknowledged in the opinion below (App. 7a-10a), for nearly a century, the law of the case doctrine in Virginia provided that, "'[w]here there have been two appeals in the *same* case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal.'" *Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684 (Va. 1917) (emphasis added) (App. 8a (quoting *Steinman*)); *see also Uninsured Employer's Fund v. Thrush*, 496 S.E.2d 57, 59 (Va. 1998). In fact, as Lisa pressed below, neither the parties nor the court identified a single case where issues decided on

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[12] *See supra* note 4 (explaining that the Virginia Supreme Court dismissed Lisa's petition in the Parentage Case for failure to file a notice of appeal).

appeal in one case between the parties were treated as law of the case on an appeal in a *separate* case between the parties. Nevertheless, for the first time, the Virginia Supreme Court applied the law of the case doctrine to refuse to reach the merits in the *Registration* Case because of what was previously decided by the Virginia Court of Appeals in the *Parentage* Case. In Virginia, the law of the case doctrine has now been transformed into the law of the *cases*.[13]

Because Virginia has not "'strictly or regularly followed'" its newly-minted "law of the cases" doctrine, it does not constitute an independent and adequate state ground barring this Court's review of the underlying federal questions. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (explaining that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed'"); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("[n]ovelty in procedural requirements cannot be permitted to thwart review"); *cf. Lee v. Kemna*, 534 U.S. 362, 382 (2002) (adequacy determination is a federal question). Such review is particularly appropriate where, as here, the Chief Justice of the Virginia Supreme Court explained in his concurring opinion that he believes the court of appeals was wrong when it held that federal law required Virginia

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[13] To the extent Virginia is treating the Parentage and Registration Cases as a single case, then all issues raised in the Parentage Case can now be considered by this Court.

to give full faith and credit to the Vermont order. (App. 13a). He joined the majority opinion, however, because he felt constrained by the law of the case doctrine.

This Court has jurisdiction to decide the federal questions raised by Lisa, which would then prevent the trial court, on remand from the Virginia Supreme Court, from registering the Vermont custody determination based on an incorrect interpretation of the PKPA and DOMA statutes and because it infringes upon the fundamental parental rights of a fit biological parent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PRESENT: All the Justices

LISA MILLER-JENKINS
v.
JANET MILLER-JENKINS
Record No. 070933

OPINION BY
JUSTICE BARBARA MILANO KEENAN
June 6, 2008

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal, we consider whether the Court of Appeals erred in directing a circuit court to register a custody and visitation order rendered by a Vermont court, based on the Court of Appeals' previous holding in the same custody and visitation dispute that the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000 & Supp. V 2005), requires that the courts of this Commonwealth give full faith and credit to the Vermont order.

In 2000, Lisa Miller-Jenkins (Lisa) and Janet Miller-Jenkins (Janet) entered into a civil union (the civil union) in Vermont that

was permitted under Vermont law.[1] Lisa and Janet decided that Lisa would bear a child, and in April 2002, after successful artificial insemination, Lisa gave birth to IMJ[2] in Virginia. Lisa, Janet, and IMJ lived together in Virginia until July 2002, when they moved to Vermont, where they lived until September 2003. At that time, Lisa and IMJ returned permanently to Virginia over Janet's objection.

In November 2003, Lisa filed a petition in a Vermont family court (the Vermont court), seeking to dissolve the civil union and to gain custody of IMJ. The Vermont court dissolved the civil union and entered a custody and visitation order (the Vermont custody order) granting temporary custody of IMJ to Lisa and temporary visitation rights to Janet. After initially allowing Janet to visit IMJ in June, Lisa thereafter refused to permit Janet to have contact with IMJ as required by the terms of the Vermont custody order.

On July 1, 2004, Lisa filed a petition in

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[1] Because the parties have the same last name, we will refer to them by their first names.

[2] Because IMJ is a minor, we refer to her by pseudonym.

the Frederick County Circuit Court (the circuit court), asking the circuit court to determine that Lisa was IMJ's "sole parent" and seeking sole custody of IMJ. On July 7, 2004, Janet filed a motion in the Vermont court seeking enforcement of the Vermont custody order and a determination that Lisa was in contempt of that court for her failure to abide by the terms of the Vermont custody order. On July 19, 2004, the Vermont court entered an order holding that the Vermont court had continuing jurisdiction over all custody matters in the case, and that the Vermont court would not defer to an order entered by a court in another state purporting to resolve the issue of custody.

In August 2004, the circuit court entered an order temporarily awarding sole custody of IMJ to Lisa and ordered that IMJ not be removed from Virginia (the Virginia custody order). Because the Vermont custody order included a provision granting Janet scheduled visitation with IMJ in Vermont, the Virginia custody order was in direct conflict with the Vermont custody order. In September 2004, the Vermont court issued an order holding Lisa in contempt for violating the terms of the Vermont custody order.

In October 2004, the circuit court concluded that it had jurisdiction over the custody dispute and entered an order awarding sole custody to Lisa, holding that

Janet did not have any parental rights, and that Lisa was IMJ's "sole" parent. In November 2004, the Vermont court issued a contrary order holding that Lisa and Janet were both "parents" of IMJ.

In January 2005, Janet appealed the Virginia custody order to the Court of Appeals (the first Virginia appeal). See Miller-Jenkins v. Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006). In November 2006, the Court of Appeals reversed the circuit court's judgment entering the Virginia custody order, holding that the circuit court did not have jurisdiction to enter the order because the dispute was a "custody and visitation determination" subject to the provisions of the Parental Kidnapping Prevention Act, 28 at 103, U.S.C. § 1738A (2000 & Supp. V 2005) (the PKPA), which accorded Vermont sole jurisdiction over the custody and visitation dispute. Id. At 103, 637 S.E.2d 337-38. The Court of Appeals concluded that the provisions of the Defense of Marriage Act, 28 U.S.C. § 1738C (2000 & Supp. V 2005) (the DOMA), did not alter the applicability of the PKPA to the custody and visitation dispute, and that the PKPA preempted all state law to the contrary, including Code § 20-45.3 Id. (the Marriage Affirmation Act). Id. at 102-03, 637 S.E.2d at 337.

The Court of Appeals further held in the first Virginia appeal that Vermont law

governed the parties' dispute, and that the courts of Virginia were bound by Vermont's interpretation of its own law. Id. at 96-97, 637 S.E.2d at 334-35. Accordingly, based on its holding that Vermont had sole jurisdiction over the case, the Court of Appeals declined to address the issue whether the civil union would have been recognized under Virginia law. Id. at 103, 637 S.E.2d at 337-38.

Following the Court of Appeals' entry of judgment in the first Virginia appeal, Lisa filed a petition for appeal to this Court. We dismissed Lisa's petition because she failed to file a notice of appeal. Miller-Jenkins v. Miller-Jenkins, Record No. 070355 (May 7, 2007).

Meanwhile, in March 2005, Janet sought to register the Vermont custody order in the Juvenile and Domestic Relations District Court of Frederick County (the juvenile and domestic relations court). The juvenile and domestic relations court registered the Vermont custody order, and Lisa appealed that decision to the circuit court. The circuit court reversed the juvenile and domestic relations court's judgment mandating registration of the Vermont custody order.

Janet appealed from the circuit court's judgment to the Court of Appeals. In an unpublished opinion, the Court of Appeals summarily reversed the circuit court's order

and reinstated the registration of the Vermont custody order, holding that this result was mandated by the Court of Appeals' decision in the first Virginia appeal. Miller-Jenkins v. Miller-Jenkins, Record No. 0688-06-4 (April 17, 2007). Lisa appeals from the Court of Appeals' judgment.

Addressing the merits of her appeal, Lisa argues that the Court of Appeals erred in concluding that the PKPA requires that Virginia courts give full faith and credit to the Vermont custody order. Lisa maintains that the DOMA, not the PKPA, is applicable in determining whether Virginia must accord full faith and credit to Vermont's child custody orders, and that the Court of Appeals erred in holding that the PKPA preempts the Marriage Affirmation Act and in not addressing whether the PKPA also preempts Article I, § 15-A of the Constitution of Virginia (the Virginia Marriage Amendment). Lisa also contends, among other things, that both the Court of Appeals' judgment and the Vermont judgment violated her fundamental parental rights.

Janet argues, however, that this Court should not reach the merits of Lisa's appeal. Janet contends that Lisa's claims are barred by the "law of the case" doctrine because all the issues presented in this appeal were resolved by the Court of Appeals' decision in the first Virginia appeal, which Lisa failed to timely appeal to this Court. Janet maintains

that the first Virginia appeal and the present appeal are the same "case," because the present appeal involves the same parties and the same issue of custody and visitation. Thus, Janet asserts that under the "law of the case" doctrine, the Court of Appeals' holding in the first Virginia appeal that the PKPA requires Virginia to give full faith and credit to the Vermont custody order was a binding adjudication that resolves the issues before us in the present appeal.

In response, Lisa contends that the "law of the case" doctrine does not apply to the present appeal, because the present appeal is not the same "case" that was before the Court of Appeals in the first Virginia appeal. According to Lisa, the issue in the first Virginia appeal was whether the courts of Virginia had jurisdiction to entertain Lisa's custody petition, while the issue in the present appeal is whether the courts of Virginia must give full faith and credit to the Vermont custody order. Lisa further maintains that the Court of Appeals could not have addressed in the first appeal whether the PKPA preempted the Virginia Marriage Amendment, because that amendment was not effective when the Court of Appeals rendered its decision in the first appeal. We disagree with Lisa's arguments. The "law of the case" doctrine is well established in the courts of this Commonwealth. Under this doctrine,

> [when] there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law.

Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917); see Uninsured Employer's Fund v. Thrush, 255 Va. 14, 18, 496 S.E.2d 57, 59 (1998); Chappell v. White, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946); Kemp v. Miller, 160 Va. 280, 284, 168 S.E. 430, 431 (1933).

Pursuant to the "law of the case" doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the "same litigation." See Kondaurov v. Kerdasha, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006). The "law of the case" doctrine applies both to issues that were actually decided by the court, and also to issues "necessarily involved in the first appeal, whether actually adjudicated or not." Kemp, 160 Va. at 285, 168 S.E. at 431; Searles v. Gordon, 156 Va. 289, 296, 157 S.E.

759, 761 (1931); Norfolk & W.R. Co. v. Duke, 107 Va. 764, 766, 60 S.E. 96, 97 (1908).

Our decisions applying the "law of the case" doctrine generally have involved litigation that has proceeded in a "linear" sequence to trial, appeal, trial on remand, and second appeal, all under the same set of pleadings. See, e.g., Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 108, 524 S.E.2d 420, 429 (2000) (stating that issue decided in first case and not appealed was not subject to relitigation on remand); Kemp, 160 Va. at 284, 168 S.E. at 431 (holding that issues decided on appeal were binding law of case on remand). However, we have never limited the "law of the case" doctrine to litigation that occurs in such sequential fashion under one set of pleadings.

In our decision in Kondaurov, we explained that our application of the "law of the case" doctrine extends to "future stages of the same litigation." 271 Va. at 658, 629 S.E.2d at 188. Thus, when two cases involve identical parties and issues, and one case has been resolved finally on appeal, we will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been resolved as part of the "same litigation" and have become the "law of the case."

Under the "law of the case" doctrine, courts assume without deciding that there

may be error in the decision of the court below. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Peterson v. Haynes, 145 Va. 653, 660, 134 S.E. 675, 677 (1926); Steinman, 121 Va. at 622, 93 S.E. at 688. As a result, a decision that becomes the "law of the case" is adhered to only in the case in which it arose and does not become binding precedent in other cases. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Steinman, 121 Va. at 622, 93 S.E. at 688.

With these principles in mind, we first decline Lisa's request that we consider the effect of the Virginia Marriage Amendment on the arguments presented in this appeal. Lisa did not ask the Court of Appeals to consider the Virginia Marriage Amendment, despite the fact that it became effective on January 1, 2007, several months before the Court of Appeals issued its opinion in the present appeal. In addition, Lisa did not assign error in this Court to the Court of Appeals' failure to consider the Virginia Marriage Amendment. Therefore, we conclude that this part of Lisa's argument is procedurally barred. See Rule 5:17(c).

We also observe that Lisa's petition and brief filed in this Court contain the identical assignments of error that she presented in her petition to this Court in the first Virginia appeal. Because Lisa sought to appeal these

same issues in the first Virginia appeal, we find no merit in her assertion that those issues were not before the Court of Appeals in the first Virginia appeal.

We have compared Lisa's arguments in the present appeal and the decision rendered by the Court of Appeals in the first Virginia appeal. We agree with the Court of Appeals' conclusion that each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal. See Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006); Miller-Jenkins v. Miller-Jenkins, Record No. 0688-06-4 (April 17, 2007).

The Court of Appeals' holding in the present appeal merely reflects the issues actually decided in the first Virginia appeal, including the issues whether the PKPA applied to the custody and visitation dispute and whether the Vermont custody order was entitled to full faith and credit. See Kemp, 160 Va. at 285, 168 S.E. at 431; Searles, 156 Va. at 296, 157 S.E. at 761; Norfolk & W.R. Co., 107 Va. at 766, 60 S.E. at 97. Thus, we conclude that the "law of the case" doctrine prevents Lisa from reasserting the issues she raises in the present appeal because each of those issues was decided finally by the first Virginia appeal, which Lisa failed to perfect in this Court. See Lockheed, 259 Va. at 108, 524 S.E.2d at 429; Searles, 156 Va. at 295-96, 157 S.E. at 761.

Our conclusion is not altered by Lisa's

argument that the "law of the case" doctrine is inapplicable to the present appeal because this appeal is not the same "case" as the first Virginia appeal. Although Lisa and Janet separately filed the cases from which the two appeals arose, both cases involved these same parties and sought adjudication of the same issue, custody and visitation regarding IMJ. The two Virginia appeals were part of the "same litigation" seeking to resolve the single question which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute. See Kondaurov, 271 Va. at 658, 629 S.E.2d at 188.

Finally, we observe that the Court of Appeals' holding in the first Virginia appeal is binding under the "law of the case" doctrine only with respect to the parties and the issues in the case before us. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Steinman, 121 Va. at 620, 93 S.E. at 687. Thus, based on our holding that the Court of Appeals' decision in the first Virginia appeal is the "law of the case," we do not reach the merits of the underlying issues presented in this appeal. See Chappell, 184 Va. at 816, 36 S.E.2d at 527; Kemp, 160 Va. at 284, 168 S.E. at 431; Peterson, 145 Va. at 660, 134 S.E. at 677; Steinman, 121 Va. at 622, 93 S.E. at 688.

For these reasons, we will affirm the Court of Appeals' judgment.

Affirmed.

CHIEF JUSTICE HASSELL, concurring.

I join the opinion of the Court. However, I write separately to state that I have serious concerns about the Court of Appeals' opinion in the former appeal, Miller-Jenkins v. Miller-Jenkins, 49 Va. App. 88, 637 S.E.2d 330 (2006). I do not believe that this decision was correctly decided. Lisa Miller-Jenkins failed to perfect an appeal from that decision in the manner required by law, see Miller-Jenkins v. Miller-Jenkins, Record No. 070355 (May 7, 2007), and, therefore, this Court could not review that decision. As the majority correctly holds, the law of the case doctrine prohibits this Court from considering the merits of the former appeal in this proceeding.

APPENDIX B

Westlaw.

Not Reported in S.E.2d Page 1
Not Reported in S.E.2d, 2007 WL 1119817 (Va.App.)
(Cite as: Not Reported in S.E.2d)

Miller-Jenkins v. **Miller-Jenkins**
Va.App.,2007.
--- S.E.2d ----Only the Westlaw citation is currently
available.
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Virginia.Richmond.
Janet **MILLER-JENKINS**
v.
Lisa **MILLER-JENKINS**.
Record No. 0688-06-4.

April 17, 2007.

From the Circuit Court of Frederick County, John
R. Prosser, Judge.

Rebecca K. Glenberg (Joseph R. Price; Arent Fox PLLC, on brief), for appellant.
Rena M. Lindevalsden (Mathew D. Staver;

Liberty Counsel, on brief), for appellee.

Present: Judges FRANK, CLEMENTS and Senior Judge FITZPATRICK.

MEMORANDUM OPINION FN*

FN* Pursuant to Code § 17.1-413, this opinion is not designated for publication.FITZPATRICK, Judge.

*1 In this appeal, Janet Miller-Jenkins challenges a March 1, 2006 order of the trial court. In that order, the trial court ruled that a Vermont order concerning child custody and visitation between the parties could not be registered in Virginia because (1) the Vermont order directly conflicted with the trial court's October 15, 2004 order adjudging Lisa Miller-Jenkins as the sole parent of IMJ, a child, (2) Vermont lacked subject-matter jurisdiction to enter its order, and (3) the Vermont order contravenes Virginia's public policy and statutory law.

In Record No. 2654-04-4, *Miller-Jenkins v. Miller-Jenkins*, 49 Va.App. 88, 637 S.E.2d 330 (2006), we vacated the trial court's October 15, 2004 order and remanded the case "to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338.

In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case, Record No. 0688-06-4. Accordingly, we likewise vacate the trial court's March 1, 2006 order and remand the case to the trial court with instruction to enter an order allowing Janet Miller-Jenkins to register the Vermont order in Virginia.

Vacated and remanded.

Va.App.,2007.
Miller-Jenkins v. Miller-Jenkins
Not Reported in S.E.2d, 2007 WL 1119817 (Va.App.)

END OF DOCUMENT

APPENDIX C

VIRGINIA: FREDERICK COUNTY
CIRCUIT COURT

In Chancery Number: CH05-000336-00
on appeal from
JDR Case No. JJ018902-01-00

LISA MILLER-JENKINS,

Petitioner-Appellant,

v.

JANET MILLER-JENKINS,

Respondent-Appellee.

ORDER DECLINING
REGISTRATION OF VERMONT ORDER

THE request by Respondent to register in Virginia the June 17, 2004 Temporary Order re: Parental Rights and Responsibilities (the "Vermont Order") came before me on November 16, 2005. The Vermont Order granted Respondent parent-child contact with Isabella, who is Petitioner's biological child. By order dated October 15, 2004, this court decreed that Petitioner is the sole biological and natural

parent of Isabella, and that, as a result, neither "Respondent nor any other person has any claims of parentage or visitation rights over Isabella." By order dated August 8, 2005, the Juvenile and Domestic Relations District Court, Frederick County registered the Vermont Order over Petitioner's objections. Petitioner contends that the Vermont Order cannot be registered in Virginia for four reasons. First, Petitioner contends that the Vermont Order, which grants Respondent parent-child contact with Petitioner's biological child *directly conflicts* with this court's October 15, 2004. Second, Petitioner contends that registration by this court of the Vermont Order is prohibited by the Marriage Affirmation Act, VA. Code § 20-45.3. Registration of the Vermont Order, which grants Respondent parent-child contact is a right arising out of a civil union: Virginia treats civil unions as void in all respects. Third, Petitioner contends that the Vermont Order cannot be registered because the Vermont court lacked subject matter jurisdiction to issue the order. Fourth, Petitioner contends that registration and enforcement of the Vermont Order would infringe Petitioner's constitutional rights as the fit, biological parent over her child.

Respondent contends registration of the Vermont Order in Virginia does not conflict with this Court's October 15, 2004 order

because Respondent asserts that she seeks to register the Vermont Order, but not to attempt to enforce it before the Virginia Court of Appeals rules on the pending appeal of this court's October 15, 2004 order. Respondent also contends that the Marriage Affirmation Act does not prohibit registration of the Vermont Order because the Act does not apply to custody disputes. Finally, Respondent contends that the courts in Vermont, not Virginia, must determine whether the Vermont Order infringes Petitioner's substantive due process rights under the federal constitution. Having fully considered the arguments presented by Petitioner in her opening and reply briefs, and the arguments presented by Respondent in her responsive brief,

It is hereby ADJUDGED, ORDERED and DECREED that:

1. The Vermont Order cannot be registered in Virginia because it is in direct conflict with this Court's October 15, 2004 order, which adjudged, ordered, and decreed that Petitioner is the sole biological and natural parent of Isabella, and, therefore, Respondent had no standing to assert a claim of parentage or visitation over Isabella Miller-Jenkins.

2. The Vermont Order cannot be

registered in Virginia because Vermont lacked subject matter jurisdiction to issue the June 7, 2004 Temporary Order re: Parental Rights and Responsibilities.

3. The Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia.

4. The August 8, 2005 order of the Juvenile and Domestic Relations District Court registering the Vermont Order is reversed.

This matter is hereby ended and to be removed from the court docket. The Clerk of the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among those matters ended.

ENTERED this 1st day of March, 2006.

s/John R. Prosser
JUDGE

WE ASK FOR THIS:

s/Rena M. Lindevaldsen

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APPENDIX D

VIRGINIA:
IN THE JUVENILE AND DOMESTIC RELATIONS
DISTRICT COURT OF FREDERICK COUNTY

JANET MILLER-JENKINS,

Petitioner,

vs. Docket No. JJ018902-01F

LISA MILLER-JENKINS,

Respondent.

IN RE: ISABELLA MILLER-JENKINS, d.o.b 04/16/02

ORDER

CAME THIS 27TH day of July, 2005, the Petitioner, by her counsel, Joseph R. Price, Esq., and also came the Respondent, in person and with her counsel, Matthew D. Staver, Esq., appearing *pro hac vice*, to be heard upon the Respondent's objections to the proposed registration of an out-of-state custody determination, pursuant to the Uniform Child Custody Jurisdiction And

Enforcement Act (UCCJEA), Va. Code §§20-146.1, *et seq.*

WHEREUPON, the Court heard argument and considered the briefs already filed, the parties having previously agreed that the resolution of this matter was a question of law, with there being no material dispute as to the facts necessary to decide the question of law. In consideration whereof, the Court makes the following findings and conclusions:

1. The order sought to be registered is an order entered by the Family Court of Rutland, Vermont on June 17, 2004; this order provides in part for the legal and physical custody, and visitation of the child, Isabella Miller-Jenkins, and is therefore a "child custody determination" as defined by the UCCJEA (Va. Code §20-146.1).

2. The Request for Registration comports procedurally with the UCCJEA (Va. Code §20-146.26) in that there is a document requesting registration, two copies, one certified, of the determination to be registered, a statement under penalty of perjury that the order is not known to have been modified, and the name and address of the person seeking registration and of any parent or person acting as a parent who has been awarded custody or visitation. Janet Miller-Jenkins is the person seeking registration, and Lisa Miller-Jenkins is the parent who has been awarded custody of the

child. Further the registering court did properly file the papers, and serve notice to Lisa Miller-Jenkins, all as required by Va. Code §20-146.26,B., 1 and 2.

3. Pursuant to Va. Code §20-146.26, the Juvenile and Domestic Relations District Court has exclusive jurisdiction to register a foreign child custody determination. However, jurisdiction over the merits of custody and visitation of a child, which would include enforcement of a registered order, is concurrent with the Circuit Court (Va. Code §16.1-244) and when the Circuit Court assumes jurisdiction, the Juvenile and Domestic Relations District Court is divested of jurisdiction. *Peple v. Peple, 5 Va. App. 414, 364 SE2d 232 (1988).* The proceedings before the Circuit Court of Frederick County, Virginia, which resulted in the order of October 15, 2004, constitute an assumption of jurisdiction by the Circuit Court of the custody and visitation of Isabella. This Court has no jurisdiction to entertain any enforcement proceeding arising out of the Vermont order, unless and until jurisdiction over such issues is remanded to it by the Circuit Court.

4. An order registering the Vermont order is not in conflict with the Order of the Circuit Court of Frederick County because the Frederick County Circuit Court had no jurisdiction to address the question of registration. Indeed, that Court apparently

specifically declined to rule on registration for that reason. An order granting registration is not a conclusion that the Vermont order is enforceable in the Commonwealth of Virginia; such a conclusion would be beyond this Court's jurisdiction, as discussed in Section 3., *supra*.

5. Registration of this order is not barred by the Affirmation of Marriage Act. Such an argument requires an inquiry into the basis of the Vermont order that is beyond the registration process. A fundamental purpose of the UCCJEA is to prevent cases from being litigated in different states in pursuit of different results. Consequently, the process of registration looks at the facial validity of the order, and not results that might have obtained differently under the law of the state where it is to be registered. Further, registration of this Order is not a recognition or condonation of the Vermont same-sex civil union; it is only a recognition that a Vermont court with jurisdiction over the contestants and the child made a custody determination. While Lisa has argued that the Vermont court lacked subject matter jurisdiction under its own statutes – a matter Vermont must address, she has not argued that the Vermont court did not have *in personam* jurisdiction. Indeed, the order and the facts not in dispute establish that Lisa and Janet both appeared before the Vermont court, with counsel, and that Lisa

invoked that Court's jurisdiction by filing the initial pleading asking for a determination of custody and visitation between her and Janet.

FOR THE FOREGOING REASONS, it is hereby ADJUDGED and ORDERED that the Order of the Family Court of Rutland, Vermont dated June 17, 2004 is registered in accord with Virginia Code §20-146.26. This Court will not entertain any proceedings to enforce the registered order unless and until it obtains jurisdiction of the custody and visitation of the child from the Circuit Court.

THIS IS A FINAL ORDER, AND EITHER PARTY HAS THE RIGHT TO APPEAL THIS ORDER, BY GIVING WRITTEN NOTICE OF THEIR APPEAL TO THE CLERK OF THIS COURT WITHIN TEN (10) DAYS OF THE DATE OF THIS ORDER.

The Clerk shall forward copies of this Order to counsel of record. There is good cause existing to dispense with the endorsement of counsel on this Order, pursuant to Rule 8:19 of the Rules of the Supreme Court of Virginia. Any party may file written objections to the form of the Order within ten (10) days of its entry.

ENTERED this 8th day of August, 2005.

/s/ William W. Sharp
WILLIAM W. SHARP, JUDGE

APPENDIX E

Court of Appeals of Virginia,
Alexandria.

*49 Va. App. 88, **637 S.E.2d 330

Janet MILLER-JENKINS

v.

Lisa MILLER-JENKINS

Record No. 2654-04-4.
Nov. 28, 2006.

Present: CLEMENTS, J., and WILLIS and ANNUNZIATA, S.J.

WILLIS, JR., Judge.

*91 Janet Miller-Jenkins ("Janet") appeals the October 15, 2004 "Final Order of Parentage" of the Circuit Court of Frederick County ("trial court"). In that order, the trial court held (1) that Lisa Miller-Jenkins ("Lisa") is "the sole biological and natural parent of" IMJ, a minor, (2) that Lisa "solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of" IMJ, and (3) that neither Janet "nor any other person has any claims of parentage or visitation

rights over" IMJ.

On appeal, Janet contends the trial court erred (1) in failing to recognize that the federal Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. §§ 1738A, barred its exercise of jurisdiction, (2) in holding that the Virginia Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Code §§ 20-146.1 *et seq.*, permitted it to exercise jurisdiction, and (3) in refusing to enforce the June 17, 2004 custody order of the Rutland County, Vermont Family Court ("Vermont court").

We hold that the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction. Accordingly, we vacate the orders of the trial court and remand this case with instruction to grant full faith and credit to the custody and visitation orders of the Vermont court.

I. BACKGROUND

Beginning in the late 1990's, the parties lived together in Virginia. On December 19, 2000, they traveled to Vermont *92 and entered into a civil union pursuant to the laws of that state. *See* Vt. Stat. Ann. Tit. 15, §§ 1201 *et seq.* Thereafter, while residing in Virginia, Lisa was artificially inseminated with sperm from an anonymous donor. In April 2002, she gave birth to IMJ. In August

2002, the parties and IMJ moved to Vermont and established residence there. In September 2003, the parties ended their relationship. Lisa moved to Virginia with IMJ. Janet remained in Vermont.

On November 24, 2003, Lisa filed in the Vermont court a "Complaint for Civil Union Dissolution." She designated IMJ as "the biological or adoptive" child of the "civil union." She asked the Vermont court to dissolve the civil union, to award her legal and physical "rights and responsibilities for the minor child," to award Janet "suitable parent/child contact (supervised)," and to "award payment of suitable child support money."

On June 17, 2004, the Vermont court entered a "Temporary Order Re: Parental Rights & Responsibilities." In that order, the Vermont court awarded Lisa "temporary legal and physical responsibility for the minor child of the parties," and awarded Janet "on a temporary basis, parent-child contact with the minor child as follows...." The order then listed the specifics of that contact, and in so listing thrice used the word "visitation."

On July 1, 2004, the day Virginia's Marriage Affirmation Act ("MAA"), Code §§ 20-45.3 became law, Lisa filed in the trial court a "Petition to Establish Parentage and for

Declaratory Relief." She asserted that she had "sole custody" of IMJ, and asked the court (1) to declare that she was "the sole parent of" IMJ, (2) to rule that she was "to be the sole parent of and to have sole parental rights over" IMJ, (3) to adjudicate any parental rights claimed by Janet "to be nugatory, void, illegal and/or unenforceable," and (4) to award her attorney's fees and costs.

**333 On July 19, 2004, after learning of the petition filed by Lisa in Virginia, the Vermont court entered the following order:

> *93 This Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues. This Court is unaware of any proceeding available in a state that does not recognize a civil union to resolve the issue of this case. This Court will not and cannot defer to a different State that would preclude the parties from a remedy.
>
> The Temporary Order for parent-child contact [is] to be followed. Failure of the custodial parent to allow contact will result in an immediate hearing on the need to

change custody.

On July 29, 2004, Janet filed a demurrer to Lisa's Virginia petition. On August 18, 2004, the trial court entered an order (1) recognizing that Janet was entering a special appearance for the purpose of contesting jurisdiction, (2) directing the parties to file memoranda addressing the question of jurisdiction, and (3) staying all visitation between Janet and IMJ except for supervised visitation in Virginia. Following an August 24, 2004 hearing, the trial court ruled it had jurisdiction pursuant to the MAA and the UCCJEA. It memorialized this ruling in a September 9, 2004 order. [FN1]

Meanwhile, the Vermont court, by order entered September 2, 2004, held Lisa in contempt for refusing to comply with the child visitation terms of its June 17, 2004 order.

On October 15, 2004, the trial court entered the final order in this case, setting forth the holdings delineated in the first paragraph of this opinion.

On appeal by Lisa, the Supreme Court of Vermont ("Vermont Supreme Court") affirmed the judgment of the Vermont court, holding, *inter alia*, that the civil union entered

into by Lisa and Janet was valid under Vermont law; that the Vermont *94 court had jurisdiction to dissolve that civil union and to determine all its implications, including the parentage of and parental rights and responsibilities with respect to IMJ; and that the Vermont court acted properly in holding Janet to be a parent of IMJ and in assigning parental rights and responsibilities to her. *Miller-Jenkins v. Miller-Jenkins,* --- A.2d ----, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 2-3, (Vt. Aug. 4, 2006). It held that PKPA afforded preemptive jurisdiction to Vermont and denied full faith and credit to Virginia orders contradicting those entered by the Vermont court. *Id.* at ---- , 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 13.

II. ANALYSIS

A. *The PKPA*

1. *Statutory History and Analysis*

28 U.S.C. §§ 1738A, commonly referred to as the Parental Kidnapping Prevention Act, carries the following title: "Full faith and credit given to child custody determinations." Subsection (a) of the PKPA reads: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody

determination or visitation determination made consistently with the provisions of this section by a court of another State."

The United States Supreme Court has succinctly summarized the thrust of the PKPA:

> The Parental Kidnap[p]ing Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. In order for a state court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in §§ 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the *95 child has no home State and it would be in the child's best interest for the **334 State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused.

> Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, §§ 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

Thompson v. Thompson, 484 U.S. 174, 175-77, 108 S.Ct. 513, 514-15, 98 L.Ed.2d 512 (1988) (footnotes omitted).

The PKPA had its genesis in the confusion concerning the applicability of the full faith and credit doctrine, 28 U.S.C. §§ 1738, to child custody orders. *See Thompson,* 484 U.S. at 180, 108 S.Ct. at 516-17. Indeed, "a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue." *Id.* Yet, despite its unofficial and common title, the PKPA is not limited to parental kidnapping cases.

"[T]he principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.... The sponsors and

supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders made in accordance with the terms of the UCCJA [FN2].... *Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations....*"

Scott v. Rutherfoord, 30 Va.App. 176, 187, 516 S.E.2d 225, 231 (1999) (quoting *Thompson,* 484 U.S. at 181, 183, 108 S.Ct. at 517-518) (emphasis added). *See also Wilson v. Gouse,* 263 Ga. 887, 441 S.E.2d 57, 60 (1994) ("the PKPA was intended not only to apply where a child was abducted by a parent and removed to another state but to remedy what was widely *96 considered to be the inapplicability of the full faith and credit statute to child custody orders" (footnote omitted)).

[1] Moreover, it is well settled that the PKPA preempts any conflicting state law. *See Meade v. Meade,* 812 F.2d 1473, 1476 (4th Cir.1987) ("The PKPA quite simply preempts conflicting state court methods for ascertaining custody jurisdiction."). *See also Murphy v. Woerner,* 748 P.2d 749, 750 (Alaska 1988); *Delk v. Gonzalez,* 421 Mass. 525, 658 N.E.2d 681, 684 (1995); *In re Clausen,* 442 Mich. 648, 502 N.W.2d 649, 673-74 (1993); *In re Relationship of Henry,* 326 Or. 166, 951 P.2d

135, 138 (1997); *State ex rel. Conforti v. Wilson,* 203 W.Va. 21, 506 S.E.2d 58, 62 (1998); *Michalik v. Michalik,* 172 Wis.2d 640, 494 N.W.2d 391, 394 (1993).

[2] Pursuant to Vt. Stat. Ann. tit. 15, §§ 1206, [FN3] Lisa filed a "Complaint for Civil Union Dissolution" with the Vermont court on November 24, 2003. By doing so, she placed before the Vermont court the issues of the parties' legal and physical "rights and responsibilities" concerning IMJ and "suitable parent/child contact." In Vermont, the term "parental rights and responsibilities" means "the rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." Vt. Stat. Ann. tit. 15, §§ 664(1). And the term "parent child contact" means "the right of a parent who does not have physical responsibility to have visitation with the child." Vt. Stat. Ann. tit. 15, §§ 664(2).

[3] In reviewing the applicability of the PKPA to the trial court's action, we are guided by the wording of the statute. "A principal rule of statutory interpretation is that courts will give statutory language its plain meaning." *Davenport v. Little-Bowser,* 269

Va. 546, 555, 611 S.E.2d 366, 371 (2005). At its threshold, the PKPA requires that a court making a child custody or visitation determination have "jurisdiction *97 under the law of such State." 28 U.S.C. §§ 1738A(c)(1). The Vermont Supreme Court held that the Vermont court had jurisdiction under the **335 laws of Vermont over the case initiated by Lisa's complaint. *See* Vt. Stat. Ann. tit. 15, §§ 1206. We are bound by that holding. *See* 28 U.S.C. §§ 1738A(a) and (g).

Furthermore, Code §§ 28 U.S.C. 1738A(c)(2)(A)(ii) sanctions the Vermont court's exercise of jurisdiction. That subsection applies where a state "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." *Id.* The parties lived together in Vermont until September 2003, when Lisa and IMJ moved to Virginia. Janet continued to live in Vermont. Lisa commenced the Vermont proceeding to dissolve the civil union in November 2003, two months after Vermont ceased to be IMJ's "home state, due to her having been removed from that state" by Lisa.

Because the Vermont court acquired jurisdiction over the issues of custody and visitation, subsections (g) and (h) of the PKPA governed the trial court's ability to entertain Lisa's petition. Those subsections read:

A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

28 U.S.C. §§ 1738A(g) and (h).

The proceeding in the Vermont court was pending when Lisa filed her petition in the trial court. The Vermont court was then exercising its jurisdiction under Vermont law and *98 consistently with the provisions of the PKPA. Thus, subsection (g) applied. The Vermont court, by virtue of its June 17, 2004

and July 19, 2004 orders, continued to exercise jurisdiction, giving application to subsection (h). Therefore, under a "plain meaning" statutory analysis, the trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court.

2. *Lisa's Position*

Lisa posits three arguments why the PKPA did not preclude the trial court from exercising jurisdiction over her petition.

a. Application of Vermont Law

First, Lisa argues that "to the extent the Vermont order constitutes a visitation determination, the Virginia court properly exercised jurisdiction because the Vermont order was not properly made." Specifically, Lisa contends the Vermont court could not grant "parent child contact" to Janet because it did not first determine that Janet was a parent. The Vermont Supreme Court rejected this argument. *Miller-Jenkins,* --- A.2d at ----, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ---- 55. Furthermore, Lisa makes this contention despite the fact that she alleged in her "Complaint for Civil Union Dissolution" that IMJ was "the biological or adoptive child[ ] of said civil union," and despite the fact that the Vermont court in its June 17, 2004 order specifically found that

IMJ was "the minor child of the parties."

Lisa cites no authority, and we know of none, that permits us to rule that the supreme court of another state incorrectly interpreted its own law. The contrary is well established: "This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Court of the State have given to those laws." *Elmendorf v. Taylor,* 23 U.S. (10 Wheat.) 152, 159, 6 L.Ed. 289 (1825).

*99 b. Custody or Visitation Determination

[4] Second, Lisa argues: "Even if the Vermont court properly made an initial custody determination within the meaning of the PKPA, the Virginia court properly exercised jurisdiction over the parentage action filed in Virginia." Specifically, Lisa contends the **336 Virginia parentage action is not a custody or visitation determination per the PKPA. Yet, Lisa's petition to the trial court prays that she be adjudicated as having "sole parental rights" over IMJ and that Janet's claim to "parental rights" be adjudged "nugatory, void, illegal and/or unenforceable." Lisa's complaint in the Vermont court asserted that IMJ was "the biological or adoptive" child of the civil union. She asked that court to award Janet "suitable parent/child contact" and to "award payment

of suitable child support money." She thus submitted the determination of IMJ's parentage to the jurisdiction of the Vermont court. Its resolution of that issue has been affirmed by the Vermont Supreme Court and is final.

Whatever semantical machinations are involved, any common understanding of the term "parental rights" includes the right to custody, *see Szemler v. Clements,* 214 Va. 639, 643, 202 S.E.2d 880, 884 (1974) ("Parental rights of custody are founded upon the strong presumption that the best interests of the child will be served by placing it in the custody of its natural parents."), and visitation, *see* Peter N. Swisher, Lawrence D. Diehl & James R. Cottrell, *Virginia Practice Series: Family Law: Theory, Practice, and Forms* §§ 15.8 (2004 ed.) ("The right of a non-custodial parent to the company and society of his or her child is well established. Barring gross unfitness which jeopardizes the well being of the child, visitation is a presumed entitlement."). *See also L.A.M. v. State,* 547 P.2d 827 (Alaska 1976). [FN4] We therefore reject the contention *100 that Lisa's "parentage action" is not a custody or visitation determination embraced by the PKPA.

c. DOMA and the MAA

Third, Lisa argues: "Even if the Vermont court properly made an initial custody

determination within the meaning of the PKPA, and the Virginia order is somehow construed as a visitation or custody determination, the Virginia court properly exercised jurisdiction over the matter by virtue of the federal Defense of Marriage Act and the [Virginia] Marriage Affirmation Act."

DOMA reads:

> No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.

28 U.S.C. §§ 1738C.

[5] Lisa argues that DOMA, enacted in 1996, effectively trumps the PKPA, enacted in 1980, thus enabling the trial court to exercise jurisdiction over Lisa's petition. We disagree.

[6] [7] Lisa cites no authority holding that either the plain wording of DOMA or its

legislative history was intended to *101 affect or partially repeal the PKPA. Therefore, any Congressional intent to repeal must be by implication. However, "[r]epeal by implication is not favored and the firmly established principle of law is that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each." *Scott v. Lichford,* 164 Va. 419, 422, 180 S.E. 393, 394 (1935).

**337 [8] [9] We do not read the two statutes to conflict. They can be reconciled. In analyzing the statutes, we are mindful that "[t]he primary objective of statutory construction is to ascertain and give effect to legislative intent. *Turner v. Commonwealth,* 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction. *Id.*" *Commonwealth v. Zamani,* 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). As we have noted, " 'Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.' " *Scott,* 30 Va.App. at 187, 516 S.E.2d at 231 (quoting *Thompson,* 484 U.S. at 183, 108 S.Ct. at 518). DOMA has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right

of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

H.R.Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. *See also id.* at 18, *reprinted in* 1996 U.S.C.C.A.N. at 2922 ("It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. [DOMA] advances this most important government interest.").

*102 Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations. Simply put, DOMA allows a state to deny recognition to same-sex marriage entered into in another state. This case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont

court regarding IMJ's custody and visitation. It cannot. The law of Vermont granted the Vermont court jurisdiction to render those decisions. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the Vermont court. She placed herself and the child before that court and laid before it the assertions and prayers that formed the bases of its orders. By operation of the PKPA, her choice of forum precluded the courts of this Commonwealth from entertaining countervailing assertions and prayers. Lisa argues that the MAA forbade the trial court to extend full faith and credit to the orders of the Vermont court. The MAA reads:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Code §§ 20-45.3.

We need not, and do not, decide whether the MAA applies to this case. If it does, it is preempted by the PKPA. *See, e.g., Meade,* 812 F.2d at 1476 (PKPA preempts conflicting

state law).

B. *The UCCJEA*

Janet also contends the trial court erred in holding that the UCCJEA permitted it to exercise jurisdiction in this case. *103 Having determined that the PKPA is the controlling law in this matter and that the PKPA preempts conflicting state law, we need not address that issue.

III. CONCLUSION

We hold that the trial court erred in failing to recognize that the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court. By so holding, we do not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. We do not comment on the constitutionality, **338 viability or breadth of--the UCCJEA and the MAA. We do not consider the merits of the rulings of the Vermont court. Those questions are not before us. The issue before us is the narrow one of jurisdiction. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction. The PKPA forbids her prosecution of this action in the courts of this Commonwealth. Accordingly, we vacate the orders of the trial court and remand this

matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court.

Vacated and remanded.
Va.App.,2006.
Miller-Jenkins v. Miller-Jenkins
49 Va.App. 88, 637 S.E.2d 330

FN1. The trial court, in the September 9, 2004 order, also certified the matter for an interlocutory appeal to this Court pursuant to Code §§ 8.01-670.1. Janet noted an appeal. Record No. 2192-04-4. By order entered January 6, 2005, we dismissed that appeal, finding that we lacked jurisdiction pursuant to either Code §§ 8.01-670.1 or Code §§ 17.1-405.

FN2. The Uniform Child Custody Jurisdiction Act, since superceded by the UCCJEA.

FN3. "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions."

FN4. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, including case law, treatise and law review, indicates that the following have

been listed as "parental rights" protected to varying degrees by the Constitution:

> (1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation.
> (2) The right to discipline the child, which includes the right to inculcate in the child the parent's moral and ethical standards.
> (3) The right to control and manage a minor child's earnings.
> (4) The right to control and manage a minor child's property.
> (5) The right to be supported by an adult child.
> (6) The right to have the child bear the parent's name.
> (7) The right to prevent an adoption of the child without the parents' consent.
> *L.A.M.*, 547 P.2d at 832 n. 13.

APPENDIX F

VIRGINIA:
IN THE CIRCUIT COURT OF FREDERICK COUNTY

Chancery No. CH04-280

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

Entered September 9, 2004.

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL

CAME THIS DAY the parties, by counsel, and were heard upon Respondent, Janet Miller-Jenkins' Demurrer to jurisdiction. Respondent contends that the exercise of jurisdiction in this Court regarding the determination of parentage and child custody and visitation is precluded by both the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody

Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.*, because the Rutland County Family Court in Vermont already has exclusive and continuing jurisdiction of this matter based on legal proceeding underway in that court involving the dissolution of the parties' civil union.

It is hereby ADJUDGED, ORDERED and DECREED that:

1. This Court can properly exercise jurisdiction in this matter regarding the determination of parentage and parental rights, including custody and visitation;

2. Based on the record before this Court, Petitioner is the biological parent of the minor child, Isabella Miller-Jenkins;

3. Virginia's UCCJEA does not preclude the exercise of jurisdiction because the jurisdiction of this Court is not substantially similar to the jurisdiction of the Vermont Court. Virginia's "Marriage Affirmation Act," Va. Code § 20-45.3, expressly provides that "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of

the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." Any claim of parentage by Respondent under Vermont law is necessarily based on Respondent's civil union with Petitioner. For the UCCJEA to preclude the exercise of jurisdiction by this Court, Respondent must be a "person acting as a parent," which the UCCJEA defines as any person other than a parent who "claims a right to legal custody under the laws of this Commonwealth." Va. Code § 20-146.1. Here, Respondent cannot claim a right to legal custody under the laws of this Commonwealth as her claims are based on rights under Vermont's civil union laws that are null and void under Va. Code § 20-45.3;

4. Respondent has objected and excepted to this Court's finding that jurisdiction is proper and has requested certification for interlocutory appeal. This Court holds this matter is appropriate for interlocutory appeal pursuant to Va. Code § 8.01-670.1. It is hereby certified that this Court's holding that neither the PKPA, 28 U.S.C.A. § 1738A, nor the UCCJEA, Va. Code Ann. § 20-146.1 *et seq.*, precludes the exercise of jurisdiction by this Court in this matter, involves a question of law as to which there is substantial ground for difference of opinion, there is no clear,

controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, determination of whether jurisdiction can be properly exercised by this Court will be dispositive of this matter, and this Court and the parties agree it is in the parties' best interest to seek interlocutory appeal;

5. This Court's temporary order of August 18, 2004, pertaining to custody of the minor child Isabella Miller-Jenkins shall remain in effect until modified by this Court; and

6. This matter shall be continued until Thursday, September 9, 2004, to set a trial date.

ENTERED this 9 day of September 2004.

s/John R. Prosser

Hon. John R. Prosser, Judge
Frederick County Circuit Court

SEEN & AGREED TO:

s/Phillip S. Griffin
Phillip S. Griffin II, Esq.
(VSB # 34576)
Peter Thos. Hansen, Esq.
(VSB # 34819)

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Counsel for Respondent Janet Miller-Jenkins

APPENDIX G

VIRGINIA:
IN THE FREDERICK COUNTY CIRCUIT COURT
IN CHANCERY NUMBER: CH04-280

LISA MILLER-JENKINS,

Petitioner,

vs.

JANET MILLER-JENKINS,

Respondent.

FINAL ORDER OF PARENTAGE

THE suit to establish parentage pursuant to VA Code § 20-49.1 et seq., came before the Court on September 28, 2004 for trial. Phillip S. Griffin, II, Esquire and Peter Thos. Hansen, Esquire appeared for the Petitioner, Lisa Miller-Jenkins. The Respondent, Janet Miller-Jenkins, though she was served notice of the proceedings in person and through her counsel, Joseph R. Price, Esquire, did not appear in person or through her counsel.

THEREUPON, the Court heard argument and took evidence which

established that Lisa Miller- Jenkins is the sole parent and biological mother of the minor child, Isabella Miller-Jenkins who was conceived by in vitro fertilization in Virginia, born in Virginia, and has resided in Virginia for more than six (6) months prior to the date of filing of the Petition for Parentage; that Janet Miller-Jenkins is not a parent of said minor child; and that the health, safety, and welfare of said minor child will best be protected by her biological mother, Lisa Miller-Jenkins, and not by Janet Miller-Jenkins.

UPON CONSIDERATION WHEREOF, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Petitioner is the sole biological and natural parent of Isabella Miller-Jenkins;

2. Petitioner solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of the minor child, Isabella Miller-Jenkins.

3. Neither Respondent nor any other person has any claims of parentage or visitation rights over Isabella Miller-Jenkins.

This matter is hereby ended and to be removed from the court docket. The Clerk of

the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among those matters ended.

ENTERED this 15th day of October 2004.

s/John R. Prosser
JUDGE

WE ASK FOR THIS:

s/Peter Thos. Hansen
Phillip S. Griffin II, Esquire
(VSB # 34576)
Peter Thos. Hansen, Esquire
(VSB # 34819)
Phillip S. Griffin II, P.C.
102 South Kent Street
Winchester, VA 22601
Counsel for Petitioner

APPENDIX H

SUPREME COURT OF VERMONT

Lisa MILLER-JENKINS

v.

Janet MILLER-JENKINS.

Nos. 04-443, 05-030.

Aug. 4, 2006.
Motion for Reargument Denied Nov. 9, 2006.

Present: REIBER, C.J., and DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.

DOOLEY, J.

¶ 1. Lisa Miller-Jenkins appeals a family court decision finding her expartner, Janet Miller-Jenkins, to be a parent of their three-year-old child conceived via artificial insemination. On appeal, Lisa [FN1] contests three family court decisions. First, she appeals the decision by the Vermont family court that found both her and Janet to be legal parents of their child [hereinafter IMJ], and awarded Lisa temporary legal and physical rights and responsibilities of the

child and Janet temporary parent-child contact. Second, Lisa appeals the family court's refusal to give full faith and credit to a Virginia court order, issued after the Vermont court's temporary custody and visitation order, that was contrary to the Vermont decree and that precluded Janet's visitation rights. Finally, Lisa appeals an order of contempt issued by the family court based on her failure to abide by the temporary visitation order.

¶ 2. We granted interlocutory appeal to address the validity of these orders. We conclude the civil union between Lisa and Janet was valid and the family court had jurisdiction to dissolve the union. Further, we decide that the family court had exclusive jurisdiction to issue the temporary custody and visitation order under both the Uniform Child Custody Jurisdiction Act (UCCJA), 15 V.S.A. §§ 1031-1051, and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000). We affirm the family court's determination that Janet is a parent of IMJ, the resulting visitation order, and the order of contempt issued against Lisa for her failure to abide by the visitation order.

¶ 3. Lisa and Janet lived together in Virginia for several years in the late 1990's. In December 2000, the parties traveled to Vermont and entered into a civil union. In

2001, while Lisa and Janet were still a couple, Lisa began to receive artificial insemination from sperm provided by an anonymous donor. Janet participated in the decision that Lisa become impregnated and helped select the anonymous donor. In April 2002, Lisa gave birth to IMJ, with Janet present in the delivery room. Lisa, Janet, and IMJ lived in Virginia until IMJ was approximately four months old and then moved together to Vermont around August of 2002. The parties lived together with IMJ in Vermont until the fall of 2003, when they decided to separate. After the separation, in September 2003, Lisa moved to Virginia with IMJ.

¶ 4. On November 24, 2003, Lisa filed a petition to dissolve the civil union in the Vermont family court in Rutland. In her complaint, Lisa listed IMJ as the "biological or adoptive child[ ]of the civil union." Lisa requested that the court award her custodial rights and award Janet parent-child contact. The family court issued a temporary order on parental rights and responsibilities on June 17, 2004. This order awarded Lisa temporary legal and physical responsibility for IMJ, and awarded Janet parent-child contact for two weekends in June, one weekend in July, and the third full week of each month, beginning in August 2004. The family court also ordered Lisa to permit Janet to have

telephone contact with IMJ once daily.

¶ 5. Although Lisa permitted the first court ordered parent-child-contact weekend, she did not allow Janet to have parent-child contact after that date, nor did she allow Janet to have telephone contact with IMJ, as the family court had ordered. In fact, Lisa has not allowed Janet to have any contact with IMJ other than during that first weekend. Meanwhile, on July 1, 2004, after the Vermont court had already filed its temporary custody and visitation order and parentage decision, Lisa filed a petition in the Frederick County Virginia Circuit Court and asked that court to establish IMJ's parentage.

¶ 6. In response, on July 19, 2004, the Vermont court reaffirmed its "jurisdiction over this case including all parent-child contact issues," stated that it would not "defer to a different State that would preclude the parties from a remedy," and made clear that the temporary order for parent-child contact was to be followed. It added that "[f]ailure of the custodial parent to allow contact will result in an immediate hearing on the need to change custody."

¶ 7. Although the Vermont and Virginia courts consulted by telephone, an interstate parental-rights contest ensued. On

September 2, 2004, the Vermont court found Lisa in contempt for willful refusal to comply with the temporary visitation order. On September 9, the Virginia court held it had jurisdiction to determine the parentage and parental rights of IMJ and that any claims of Janet to parental status were "based on rights under Vermont's civil union laws that are null and void under Va.Code § 20-45.3." On October 15, the Virginia court followed with a parentage order finding Lisa to be the "sole biological and natural parent" of IMJ and holding that Janet has no "claims of parentage or visitation rights over" IMJ. That order is on appeal to the Virginia Court of Appeals.

¶ 8. On November 17, 2004, the Vermont court found that both Lisa and Janet had parental interests in IMJ and set the case for a final hearing on parental rights, property, and child support. Thereafter, on December 21, 2004, the Vermont court issued a ruling refusing to give full faith and credit to the Virginia parentage decision. Lisa appealed both of these decisions, as well as the decision finding her in contempt.

I. Interstate Jurisdiction and Full Faith and Credit

¶ 9. This case is, at base, an interstate jurisdictional dispute over visitation with a

child. Lisa argues here that the Vermont family court should have given full faith and credit to the Virginia court's custody and parentage decision, which determined Janet had no parentage or visitation rights with respect to IMJ. The family court rejected this argument because it concluded the Virginia decision did not comport with the PKPA, "which was designed for the very purpose of eliminating jurisdictional battles between states with conflicting jurisdictional provisions in child custody disputes." The Vermont court determined it had exercised jurisdiction consistent with the requirements of the PKPA and had continuing jurisdiction at the time Lisa's action was filed in Virginia. Therefore, it further concluded the Virginia court was prohibited from exercising jurisdiction by the PKPA, § 1738A(g), and the Vermont court had no obligation to give full faith and credit to the conflicting Virginia decision.

¶ 10. In analyzing Lisa's arguments, we note that she does not contest that if she and Janet were a validly married heterosexual couple, the family court's PKPA analysis would be correct. Because of her tacit acceptance of the family court's analysis with regard to jurisdiction under the PKPA, we provide only a summary description of why we believe that the family court was correct.

¶ 11. The purpose of the PKPA is to determine when one state must give full faith and credit to a child custody determination of another state, such that the new state cannot thereafter act inconsistently with the original custody determination. Thompson v. Thompson, 484 U.S. 174, 181, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). The PKPA follows on, and includes many of the provisions of, the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in Vermont as 15 V.S.A. §§ 1031-1051. These acts were adopted to respond to "a growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states." National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Act, Prefatory Note (1968). The PKPA embodies preferences "to leave jurisdiction in the state which rendered the original decree[,] ... to promote the best interests of the child[,] ... [and to] discourage[ ] interstate abduction and other unilateral removals of children for the purpose of obtaining a favorable custody decree." Michalik v. Michalik, 172 Wis.2d 640, 494 N.W.2d 391, 398 (1993).

¶ 12. The PKPA applies equally to a visitation determination, requiring states to

enforce "any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a). Because the first custody and visitation determination with respect to IMJ was made by the Vermont court, we must first examine whether that court exercised jurisdiction "consistently with the provisions of" the PKPA. Id. If it did, and if it continued to have jurisdiction when Lisa filed her proceeding in the Virginia court, the Virginia court was without jurisdiction to modify the Vermont order. Id. § 1738A(g), (h).

¶ 13. In order for a Vermont court to exercise jurisdiction consistent with the PKPA, it must have jurisdiction under Vermont law, id. § 1738A(c)(1), and meet one of four conditions, id. § 1738A(c)(2)(A)-(D). In this case, it met the condition in subsection (A)(c)(2)(A)(ii) that Vermont "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." Id. § 1738A(c)(2)(A)(ii). For purposes of this provision, "home State" is defined to mean "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as

parent, for at least six consecutive months." Id. § 1738A(b)(4). Because Vermont had been IMJ's home state within six months before Lisa filed her dissolution petition in November 2003, Lisa had removed IMJ from Vermont, and Janet lived in Vermont on the date the dissolution proceeding was commenced, the requirements of subsection (A)(ii) were met. See Matthews v. Riley, 162 Vt. 401, 406, 649 A.2d 231, 236 (1994).

¶ 14. The PKPA also requires that the court have jurisdiction under Vermont law. Whether local jurisdiction is present is determined by the UCCJA. 15 V.S.A. § 1032(a); Matthews, 162 Vt. at 406, 649 A.2d at 235. For the exact reason that the Vermont proceeding met the PKPA condition discussed above, supra, ¶ 13, it met the identically-worded provision of the UCCJA. Compare 15 V.S.A. § 1032(a)(1)(B) with 28 U.S.C. § 1738A(c)(2)(A)(ii). Thus, the family court had jurisdiction under Vermont law as required by 28 U.S.C. § 1738A(c)(1).

¶ 15. Because the Vermont dissolution proceeding was still pending in July 2004, when Lisa filed her action in the Virginia court, and the Vermont proceeding was consistent with the PKPA, the Virginia court lacked jurisdiction pursuant to § 1738A(g) of the PKPA. That section specified that the court could not exercise jurisdiction over a

proceeding to determine the custody of, or visitation with, IMJ while the Vermont proceeding was pending. The Virginia court violated this section by exercising jurisdiction over the case filed by Lisa.

¶ 16. Because the Vermont court had issued a temporary custody and visitation order, the Virginia court was also governed by § 1738A(h) of the PKPA. That section prohibited the Virginia court from modifying the Vermont court's order unless the Vermont court "no longer [had] jurisdiction to modify such determination" or had "declined to exercise jurisdiction to modify such determination." Since the Vermont court continued to exercise jurisdiction over the Vermont proceeding, the Virginia court could have modified the order only if the Vermont court had lost its initial jurisdiction. Under the PKPA, a court that had initial jurisdiction to issue a custody or visitation order continues to have jurisdiction as long as it continues to have jurisdiction under state law and one of the contestants remains a resident of the state. Id. § 1738A(d); Matthews, 162 Vt. at 407, 649 A.2d at 236. The latter requirement is met because Janet continues to reside in Vermont.

¶ 17. Again, the former requirement of continuing jurisdiction is met if it is

authorized by the UCCJA. See Matthews, 162 Vt. at 407, 649 A.2d at 236-37. At the time the Virginia court acted, the Vermont court had jurisdiction to modify its own visitation order if:

> (2) it is in the best interest of the child that a court of this state assume jurisdiction because:
>
> (A) the child and his parents, or the child and at least one contestant, have a significant connection with this state; and
>
> (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

15 V.S.A. § 1032(a)(2). These provisions were met because IMJ had recently resided in Vermont and the evidence of IMJ's relationship with Janet was present in Vermont. Matthews, 162 Vt. at 412, 649 A.2d at 239.

¶ 18. The Vermont court had continuing jurisdiction over the matter of Janet's visitation with IMJ. Therefore, the Virginia order extinguishing Janet's visitation right was issued in violation of § 1738A(h) of the PKPA. The Vermont court was not required to give full faith and credit to the Virginia

order issued in violation of the PKPA. Matthews, 162 Vt. at 412-13, 649 A.2d at 240.

¶ 19. Lisa makes three arguments against applying this analysis in this case. First, she argues that the Virginia proceeding is a parentage action, and the PKPA does not apply to parentage actions. Even if we were to accept this argument, we do not understand how it would determine the question before us--that is, whether the Vermont court must give full faith and credit to the Virginia parentage decision. Apparently, Lisa's logic is as follows: Although the Vermont court determined that Janet is a parent of IMJ, the Virginia court could and did determine that Janet is not a parent of IMJ; the Vermont court must now accept the Virginia determination and strike any visitation order based upon the Vermont parentage determination. Whether Virginia must enforce the Vermont visitation order is not directly involved in this appeal, but that is an entirely different question from whether full faith and credit requires the Vermont court to strike its own visitation order because the Virginia court refuses to recognize its validity based entirely on Virginia law. In Medveskas v. Karparis, 161 Vt. 387, 395, 640 A.2d 543, 546- 47 (1994), we held that we would not extend full faith and credit to another state's custody

determination if that state's court refused to extend full faith and credit to an earlier Vermont custody order. We will not give "greater faith and credit to the judgments of the courts of other states" than we give to our own courts' judgments. Id. at 394, 640 A.2d at 546 (quotations omitted). The same reasoning applies here.

¶ 20. Lisa is making the curious argument that if the PKPA does not apply to this dispute, Vermont will be required to give full faith and credit to the Virginia parentage decision and custody and visitation order. Our cases have routinely stated exactly the opposite position--that is, in the absence of a requirement imposed by the PKPA, Vermont courts will not extend full faith and credit to another state's custody and visitation order. See Rocissono v. Spykes, 170 Vt. 309, 316, 749 A.2d 592, 597 (2000) (Arizona's assertion of jurisdiction over custody dispute was inconsistent with the PKPA "and thus not entitled to full faith and credit"); Columb v. Columb, 161 Vt. 103, 107, 633 A.2d 689, 691 (1993) (custody order that does not meet PKPA requirements "is not entitled to full faith and credit in other states").

¶ 21. In any event, we reject the argument that the PKPA is inapplicable. The PKPA applies to custody or visitation determinations. 28 U.S.C. § 1738A(a). It

defines a "custody determination" as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." Id. § 1738A(b)(3). It defines a visitation determination in nearly identical terms. Id. § 1738A(b)(9). Lisa's dissolution petition to the Rutland Family Court sought a custody determination, and the court's temporary order included a temporary determination of both custody and visitation. Lisa's parentage petition in the Virginia court sought a determination that Janet had no parental rights, and the Virginia court issued a temporary order requiring Janet's visitation to be supervised and then a permanent order that Janet had no right to visit IMJ. Plainly, the Virginia court decisions included visitation determinations as the term is defined in the PKPA. Just as plainly, the PKPA applied to those decisions.

¶ 22. Lisa's argument, then, is that a custody or visitation determination arising out of one kind of proceeding is covered by the PKPA, and a custody or visitation determination arising out of another is not. All of the decisions interpreting the PKPA in private family disputes conclude that the PKPA draws no such distinction. Martinez v. Reed, 623 F.Supp. 1050, 1055 (E.D.La.1985) (PKPA applies to guardianship decision); Guernsey

v. Guernsey, 794 So.2d 1108, 1110 (Ala.Civ.App.1998) (parentage); Ray v. Ray, 494 So.2d 634, 637 (Ala.Civ.App.1986) (guardianship); In re Pima County Juvenile Action No. J-78632, 147 Ariz. 527, 711 P.2d 1200, 1206 (Ct.App.1985) (dependency proceeding initiated by grandfather), rev'd on other grounds, 147 Ariz. 584, 712 P.2d 431, 435 (1986); In re B.B.R., 566 A.2d 1032, 1040 n. 24 (D.C.1989) (habeas corpus); E.E.B. v. D.A., 89 N.J. 595, 446 A.2d 871, 876 (1982) (habeas corpus); In re Bean, 132 N.C.App. 363, 511 S.E.2d 683, 686 (1999) (termination of parental rights). In fact, this Court recently held that the PKPA applied to a guardianship proceeding from another state. Jackson v. Hendricks, 2005 VT 113, ¶ 9 n. 1, 179 Vt. ----, 893 A.2d 292 (mem.). The one case on which Lisa relies found that the PKPA did not apply to a parentage proceeding precisely because no party asked for a custody or visitation order and the court did not address custody or visitation. Sheila L. v. Ronald P.M., 195 W.Va. 210, 465 S.E.2d 210, 221 (1995). Such a situation is inapposite to the circumstances in this case.

¶ 23. We recognize that some courts have held the PKPA does not apply to neglect and dependency proceedings where the state is intervening to protect the child, see In re A.L.H., 160 Vt. 410, 413 n. 2, 630 A.2d 1288, 1290 n. 2 (1993) (citing cases), and Lisa has

referenced these cases. These cases rely on three rationales: (1) the UCCJA explicitly applies to "neglect and dependency proceedings," 15 V.S.A. § 1031(3), and the PKPA, which was drafted to generally track the UCCJA, intentionally omitted that language, see L.G. v. People, 890 P.2d 647, 661-62 (Colo.1995); In re L.W., 241 Neb. 84, 486 N.W.2d 486, 500-01 (1992); State ex rel. Dep't of Human Servs. v. Avinger, 104 N.M. 255, 720 P.2d 290, 292 (1986); (2) the purpose of the PKPA is to address the interstate enforcement of child custody decrees, and, in particular, particularly to address child-snatching, and not to interfere with a state's protection of a dependent and neglected child, see L.G., 890 P.2d at 661-62; In re L.W., 486 N.W.2d at 500-01; Avinger, 720 P.2d at 292; and (3) the continuing jurisdiction section of the PKPA, § 1738A(d), refers to a contestant, a term defined in § 1738A(b)(2) not to include the state, see In re L.W., 486 N.W.2d at 500-01. None of these rationales suggests that the PKPA should not apply in this visitation dispute between private parties.

¶ 24. For the above reasons, we reject Lisa's argument that the PKPA does not apply to the Virginia parentage decision. We hold that the PKPA applies to this case and does not command the Vermont court to give full faith and credit to the parentage decision of

the Virginia court that was issued in violation of the PKPA.

¶ 25. Lisa's second argument is that the PKPA has been superseded by the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2000), and DOMA requires that the Vermont court give full faith and credit to the Virginia decision and order. DOMA reads:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id. Lisa argues that a Vermont civil union is a relationship between persons of the same sex that is treated as a marriage under Vermont law and that Janet's right of visitation, if any, arises from that relationship. Thus, she argues that DOMA authorized the Virginia court to reject any right of visitation based on the Vermont

court order, and the Vermont court must give full faith and credit to the Virginia order.

¶ 26. The family court concluded that DOMA would not provide Lisa the relief she sought:

> Nor is the application of the PKPA in this case, as Lisa's counsel has suggested, hindered by the more recently enacted Federal Defense of Marriage Act (DOMA).... Whether or not a Virginia court may be permitted under DOMA to decline to give effect to the judicial proceedings in Vermont in a Virginia court is not relevant to the essential question before this court, or before the court of Virginia as a prerequisite for exercising its jurisdiction, of whether this Vermont court had jurisdiction under Vermont law over this dispute before it was filed in Virginia. Clearly Vermont has jurisdiction and therefore the Commonwealth of Virginia's judgment is not entitled to full faith and credit.

Janet urges us to affirm on a broader and different ground: that DOMA and the PKPA should be construed to be consistent; this

consistent construction would be that DOMA does not apply to custody and visitation orders.

¶ 27. We affirm on the ground employed by the Vermont court. This case is about whether the Vermont court must give full faith and credit to the decision of the Virginia court, and not the reverse. Unlike the PKPA, in no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state. Its sole purpose is to provide an authorization not to give full faith and credit in the circumstances covered by the statute. Thus, DOMA does not aid Lisa's attack on the Vermont order.

¶ 28. Under Lisa's interpretation, we would be required to give full faith and credit to the Virginia court's decision not to give effect to the fully valid order of the Vermont court. Indeed, if we were to accept that argument, the Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order unenforceable in every state, including Vermont. As we discussed above in relation to Lisa's PKPA argument, supra, ¶ 19, we held in Medveskas, 161 Vt. at 394, 640 A.2d at 546, that we will not give "greater faith and credit" to another state's judgment that is in conflict with a valid judgment of our

own courts. Because we can affirm on this narrow ground, we need not reach the broader question of whether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union.

¶ 29. Lisa's third ground for arguing the PKPA does not apply is that the civil union was void because both Janet and Lisa were residents of Virginia when they entered the civil union in Vermont, and, as a result, Virginia courts did not have to recognize it. We consider this argument in the next section of the opinion and reject it.

¶ 30. In summary, none of Lisa's arguments change our conclusion that this is a straightforward interstate jurisdictional dispute over custody, and the governing law fully supports the Vermont court's decision to exercise jurisdiction and refuse to follow the conflicting Virginia visitation order.

II. The Validity of the Civil Union

¶ 31. Lisa next argues the civil union of her and Janet is void as a matter of law because it was entered into when both parties were residents of Virginia and would have been void if entered into in Virginia. She then argues that since the civil union is void, the temporary visitation order based upon the

civil union is also void. In making these arguments, she relies first upon 15 V.S.A. § 6, which provides:

> A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

She argues that because same-sex legal unions are void in Virginia, Vermont must also find their union void. Lisa recognizes that § 6 alone, which applies to marriages, does not void the civil union. As we held in Baker v. State, 170 Vt. 194, 201, 744 A.2d 864, 869 (1999), a union between partners of the same gender is not defined by Vermont law as a marriage. The Legislature explicitly codified this holding in 15 V.S.A. § 8.1999, No. 91 (Adj.Scss.), § 25. Thus, Lisa argues, § 6 applies to civil unions as well as marriages as a result of 15 V.S.A. § 1204(a), a section of the civil union statute, which states:

> Parties to a civil union shall have all the same benefits, protections

> and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

Accordingly, Lisa argues § 1204(a) incorporates § 6 and voids her union to Janet.

¶ 32. The Vermont court did not address these arguments because Lisa failed to raise them. Thus, Janet's first response on appeal is that we should not reach Lisa's arguments on this point because they have not been preserved. Janet also notes that even if § 6 applies to civil unions, whether § 6 would even fit the facts of this case is in dispute. For example, at the time the parties entered into the civil union in 2000, Virginia law prohibited "[a] marriage between persons of the same sex" and made such marriages entered into in another state "void" in Virginia, Va.Code Ann. § 20-45.2 (West 2005), but it was silent on the effect of civil unions. Only in 2004 did Virginia enact a comparable statute prohibiting civil unions. Id. § 20-45.3 (effective July 1, 2004). Thus, whether a civil union entered into in Vermont in 2000 would have been void if 15 V.S.A. § 6 applied remains a question. Further, § 6 applies only if the parties are

"residing and intending to continue to reside in another state or jurisdiction." The record specifies that Lisa and Janet resided in Virginia at the time of the civil union, but it is silent on their intent for the future.

¶ 33. Lisa argues that despite these issues, we should decide the validity of the civil union because it is jurisdictional. Although we question that characterization, we exercise our discretion to reach the merits because it involves a pure question of law, on which our review is de novo, see, e.g., Kelly v. Lord, 173 Vt. 21, 34, 783 A.2d 974, 985 (2001) (exercising discretion to hear appeal from nonfinal judgments), and further involves a matter of public interest.

¶ 34. On the merits, we are guided at the outset by familiar canons of statutory construction. Our overall goal in construing a statute is to implement the intent of the Legislature. Farris v. Bryant Grinder Corp., 2005 VT 5, ¶ 8, 177 Vt. 456, 869 A.2d 131. In pursuing this goal, we normally apply the plain meaning of the statute if it is unambiguous. Id. Where there is uncertainty about legislative intent, "we must consider the entire statute, including its subject matter, effects and consequences, as well as the reason for and spirit of the law." In re Hinsdale Farm, 2004 VT 72, ¶ 5, 177 Vt. 115, 858 A.2d 249.

¶ 35. Here, we believe that the plain meaning of the civil union statute, 15 V.S.A. § 1204(a), is inconsistent with Lisa's argument and does not incorporate § 6. Section 1204 plainly addresses the responsibilities of persons who have entered into a civil union and not the eligibility for that status. This plain meaning is reinforced by the fact that the Legislature specifically included another section in the same chapter, entitled "Requisites of a valid civil union," id. § 1202, referring to eligibility for civil unions, and did not include residency as one of its requirements. More generally, the statute on which Lisa relies to support her claim that the civil union is void, § 6, is part of chapter 1 of Title 15, which establishes the requirements of marriage. Where the Legislature intended that chapter 1's requirements apply to civil unions, it said so directly by a separate provision of the civil union chapter, see id. § 1203 (disallowing parties from entering into civil unions with the same specified relatives the marriage statute also prohibits parties from marrying), or by amending the marriage statute so that it also applied to civil unions, id. § 4 (voiding marriages when previous marriage or civil union is still in force). These provisions would be superfluous if § 1204 generally made chapter 1 applicable to civil unions. Accordingly, there is no indication that the

Legislature intended to apply chapter 1 generally to civil unions or to apply specific sections beyond those explicitly adopted.

¶ 36. Beyond the statute's plain language, there are other indications that the Legislature did not intend § 6 apply to civil unions. First, it is evident the Legislature expected that nonresidents would obtain civil unions, as it specifically provided that any town clerk in the state could issue a license to applicants "if neither is a resident of the state." 18 V.S.A. § 5160(a). We take judicial notice that Vermont was the first state to offer civil unions. Thus, under Lisa's broad interpretation of 15 V.S.A. § 6, which she applies even to states with no explicit prohibition on civil unions, no resident of another state who intended to remain a resident of that state could have validly entered into a Vermont civil union because no other state allowed civil unions at that time. [FN2] Section 5160(a) of Title 18 evidences the absurdity of that claim.

¶ 37. Moreover, where the Legislature intended to impose a residency requirement on couples in civil unions--that is, in the case of dissolution--it stated so explicitly. See 15 V.S.A. § 1206 ("The dissolution of civil unions shall follow the same procedures ... that are involved in the dissolution of marriage ..., including any residency requirements."). In

addition, the Legislature specifically required town clerks to provide civil union applicants with information to advise them "that Vermont residency may be required for dissolution of a civil union in Vermont." 18 V.S.A. § 5160(f) (emphasis added). In this context, we take the absence of an explicit statement that residency would normally be required for civil union formation as a strong indication that the Legislature intended no such requirement.

¶ 38. Finally, the Legislature has charged the Secretary of State and the Commissioner of Health with providing public information about the requirements and procedures of the statute, see 15 V.S.A. § 1207(a) (Commissioner of Health to supply forms); 18 V.S.A. § 5160(f) (Secretary of State to provide information to be handed out by town clerks), and created and charged the Vermont Civil Union Review Commission with implementing a plan "to inform members of the public ... about the act," 1999, No. 91 (Adj.Sess.), § 40(c). We give some deference to the construction of the applicable statutes by these implementing agencies. Laumann v. Dep't of Pub. Safety, 2004 VT 60, ¶ 7, 177 Vt. 52, 857 A.2d 309; Agency of Natural Res. v. Deso, 2003 VT 36, ¶ 14, 175 Vt. 513, 824 A.2d 558 (mem.). [FN3] The Secretary of State has created an online pamphlet, entitled "The Vermont Guide to Civil

Unions" (revised Aug. 2005), which states in Part 3 that "[t]here are no residency or citizenship requirements for Vermont Civil Unions." http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html (last visited July 31, 2006). The Commissioner of Health has also posted an online pamphlet entitled "Civil Unions in Vermont: Questions and Answers to Help you Plan your Vermont Civil Union." It states in response to the first question, "Who can form a civil union?," that "[y]ou do not have to be Vermont residents to form a civil union in Vermont." http://healthvermont.gov/research/records/civil.pdf(last visited July 31, 2006). Necessarily, these officials have adopted a different construction of the civil union statutes from that urged by Lisa in this case.

¶ 39. Although the Vermont Civil Union Review Commission has not provided additional public commentary, it issued a report in 2002 that stated that 4,371 civil unions had been completed as of January 2002, and that:

> Most civil unions have involved parties who are nonresidents. The proportion of civil unions involving Vermont residents continues to decrease. In July 2000, 29% of civil unions involved

> Vermont residents. This number dropped to 22% in August and September of 2000, and, currently, 11% of people entering civil unions are Vermonters. Residents from 48 states, the District of Columbia, Canada and several other countries have established civil unions in Vermont. Besides Vermont, the largest numbers of civil union parties have been residents of New York, Massachusetts and California.

Report of the Vt. Civil Union Review Comm'n, Finding 3 (Jan.2002), http://www.leg.state. vt.us/baker/Final CURCReportfor2002.htm (last visited July 31, 2006). It concluded that "Act 91 Is Working As Intended." Id., Conclusion 6. The Commission could not reach that conclusion if it found that the Legislature intended to prohibit nonresidents from entering civil unions in Vermont because their states of residency would not recognize their unions. Further, the Legislature has taken no action in response to the Commission's report, as one might expect if the overwhelming use of civil unions by nonresidents was unintended.

¶ 40. We hold that the Legislature did not intend to apply to civil unions the prohibition

on certain nonresidents entering into Vermont marriages. As a result, we hold that the civil union between Lisa and Janet was valid. Accordingly, we reject Lisa's argument that the temporary visitation order is void because the civil union is void.

III. The Parentage Determination

¶ 41. Lisa's third argument attacks the temporary visitation order on the basis that Janet is not a parent of IMJ. [FN4] She argues that Janet cannot be a parent of IMJ because she is not biologically connected to her. In making this argument, Lisa looks primarily to the Parentage Proceedings Act, 15 V.S.A. §§ 301-308. Under § 308(4):

> A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if ... (4) the child is born while the husband and wife are legally married to each other.

This statute applies to civil unions by virtue of § 1204(f):

> (f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as

> those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

See also id. § 1204(d) ("The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

¶ 42. Lisa contends that because the Legislature used the word "natural" in § 308(4), it must have intended the presumption of parentage to apply only to a person who is biologically connected to the child. She argues, therefore, that because she is IMJ's biological mother, and Janet is not, Janet cannot be a parent of IMJ. If Janet is not IMJ's parent, Lisa continues, then the family court erred in awarding Janet visitation.

¶ 43. The Vermont court responded to Lisa's argument by holding that, because Lisa gave birth through artificial insemination, the presumption of parentage contained in § 308 applied to Janet, just as it would have applied to Lisa's husband if she had had one at the time of the birth.

¶ 44. Section 308(4) was not intended to produce the result Lisa advances and is

ultimately irrelevant to the circumstances creating parenthood in this case. The presumption provision was added to § 308 quite recently, see 1993, No. 228 (Adj.Sess.), § 13 (adding subsection (4) to 15 V.S.A. § 308), apparently to make the collection of child support easier, see 15 V.S.A. § 293(b) (where presumption applies, it is a "sufficient basis for initiating a support action ... without any further proceedings to establish parentage"). We have examined the legislative history of the statute and can find no indication that it was intended to govern the rights of parentage of children born through artificial insemination or to same-sex partners, or to do anything other than provide a speedy recovery of child support. Thus, to accept Lisa's argument, we would have to find that Lisa's desired effect of § 308(4) is an unintended consequence of a legislative amendment enacted for a different purpose. As explained below, we find § 308(4) does not have that unintended consequence.

¶ 45. Ultimately, we have both a short and a long answer to Lisa's argument regarding the effect of § 308(4), and, because of the public interest in the issue, we provide both. The short answer is that the issue is controlled by this Court's decision in Paquette v. Paquette, 146 Vt. 83, 499 A.2d 23 (1985), under which the presumption of

parentage contained in § 308 is irrelevant. In Paquette, the parties were involved in a divorce and the husband sought custody of both the child born of the marriage and another child born of the wife's prior marriage. The lower court ruled that custody could not be awarded to a stepfather and, on that basis, denied the husband custody of the older child. On appeal, this Court reversed, holding that where the stepparent has assumed the role of a parent with respect to the child--that is, had acted "in loco parentis"--the lower court can give custody to the stepparent, over the opposition of the biological parent, if it finds that it is in the best interest of the child to do so and "the natural parent is unfit or ... extraordinary circumstances exist to warrant such a custodial order." Id. at 92, 499 A.2d at 30.

¶ 46. Paquette does not explicitly discuss visitation, but its rationale fully applies to visitation as well as to custody. See S. Silverman, Stepparent Visitation Rights: Toward the Best Interests of the Child, 30 J. Fam. L. 943, 948 (1992) (characterizing Paquette as a stepparent visitation case). In fact, the concerns expressed about the possible interference with the rights of biological parents are of much less weight in the case of visitation.

¶ 47. Under Paquette, regardless of the

meaning of 15 V.S.A. § 308(4), Janet has at least the status of a stepparent of IMJ by virtue of § 1204(d) and (f). Assuming extraordinary circumstances are even required for a visitation order, we conclude that extraordinary circumstances are present in this case. The court's findings demonstrate that Janet acted in loco parentis with respect to IMJ as long as Janet and Lisa were together. Thus, our short answer to Lisa's argument is that the visitation order is supported by Paquette even if Janet is not considered IMJ's parent under § 308(4).

¶ 48. There is also a longer answer to Lisa's argument that biology must control the parentage issue. We find that Janet has status as a parent, even beyond her stepparent status under Paquette. If we were to accept Lisa's opposing position and conclude biology controlled, a child born from artificial insemination would have no second parent--whether that status is sought by a man married to the child's mother or by a woman or man in a civil union with the child's biological parent--unless the putative second parent adopted the child. In fact, the logical extension of Lisa's position that a biological connection is necessary for parentage is that the husband of a wife who bears an artificially inseminated child cannot be the father of that child, just like a civil union spouse cannot be a parent to the child.

Such a holding would cause tremendous disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology, and we must tread carefully so that we incur such a consequence only if necessary. As a result, we reach the broader and longer answer to Lisa's argument and conclude that such a holding would be wrong.

¶ 49. We are facing a situation similar to that in In re B.L.V.B., 160 Vt. 368, 628 A.2d 1271 (1993), which was decided before the civil union law and involved a same-gender couple. As in this case, one member of the couple in In re B.L.V.B. conceived a child through artificial insemination, and her partner sought to adopt the child to also become a parent. The probate court ruled that the governing statute, which stated that a child's natural parent's rights shall not be affected when the parent's spouse adopts the child, required that if the adoption were granted to the same-sex partner, the biological mother's parental rights would be terminated because the adopting parent was not the biological parent's spouse (or the child's stepparent).

¶ 50. Despite the language of the governing statute, we reversed in that case, holding that the probate court's result was at odds with the intent of the Legislature: "[W]e

cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner." Id. at 373, 628 A.2d at 1274. We stated further:

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest....

As the case law from other jurisdictions illustrates, our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the

public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are de facto parents may be awarded custody or visitation or reached for support.

Id. at 375-76, 628 A.2d at 1275-76.

¶ 51. The disruption that would be caused by requiring adoption of all children conceived by artificial insemination by nonbiological parents is particularly at variance with the legislative intent for civil unions. The Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage. The Legislature added a separate section on the construction of the civil union statutes that provides in part:

> Treating the benefits, protections and responsibilities of civil marriage differently from the benefits, protections and responsibilities of civil unions is permissible only when clearly necessary because the gender-based text of a statute, rule or judicial precedent would otherwise produce an unjust, unwarranted, or confusing result,

> and different treatment would promote or enhance, and would not diminish, the common benefits and protections that flow from marriage under Vermont law.

1999, No. 91 (Adj.Sess.), § 39(a). The result of Lisa's statutory argument would be to produce separate benefits and protections for couples in civil unions. Under her argument, no partner in a civil union could be the parent of a child conceived by the other partner without formally adopting that child.

¶ 52. As in In re B.L.V.B., we face the problem here of a family with a child created by artificial insemination, and the Legislature has not dealt directly with new reproductive technologies and the families that result from those technologies. Nonetheless, the courts must define and protect the rights and interests of the children that are part of these families. See In re B.L.V.B., 160 Vt. at 376, 628 A.2d at 1276; In re Estate of Kolacy, 332 N.J.Super. 593, 753 A.2d 1257, 1263 (2000) (finding that even though child was conceived via assisted reproductive technology, "once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires"). We express, as many

other courts have, a preference for legislative action, see, e.g., In re M.J., 203 Ill.2d 526, 272 Ill.Dec. 329, 787 N.E.2d 144, 150 (2003); Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 756 N.E.2d 1133, 1139 (2001), but in the absence of that action, we must protect the best interests of the child.

¶ 53. With this background in mind, we turn back to § 308(4). The purpose of the statute is to create a rebuttable presumption, the main effect of which is to assign the burden of production. Godin v. Godin, 168 Vt. 514, 530, 725 A.2d 904, 915 (1998) (Dooley, J., dissenting). Thus, the presumption serves the purpose of allowing more summary support actions even in the absence of a parentage adjudication, which effectively eases child support decisions. See 15 V.S.A. § 293(b) (where presumption of parentage under § 308 applies, a support action against the presumed parent may be filed without a prior parentage adjudication). Because the statute creates only a presumption, however, it does not prevent proof of the fact in issue through other means. Thus, if the presumption did not apply, [FN5] the only effect in this case would be that Janet would have the burden of production to prove parenthood, a burden she assumed in presenting her case to the family court. Where the presumption cannot apply, it does not mean the individual is not a parent; it

simply means we must look to see whether parentage exists without the use of the presumption--the same way we would have determined parentage before the adoption of § 308(4).

¶ 54. Lisa focuses almost exclusively on the word "natural," finding in its use the legislative intent that only biological parents can be parents for purposes of the parentage statute. [FN6] We find this to be an overly broad reading of the language. The parentage act does not include a definition of "parent." It does not state that only a natural parent is a parent for purposes of the statute. In fact, the statute is primarily procedural, leaving it to the courts to define who is a parent for purposes of a parentage adjudication. Given its origin and history, it is far more likely that the legislative purpose was to allow for summary child support adjudication in cases where biological parenthood is almost indisputable.

¶ 55. We reach then the ultimate question--whether Janet is a parent within the meaning of the parentage act--without consideration of § 308, which is irrelevant to both sides of the argument in this case. We have held that the term "parent" is specific to the context of the family involved. For instance, in In re S.B.L., 150 Vt. 294, 302, 553 A.2d 1078, 1083-84 (1988), we held that

the biological father of a child born out of wedlock is not a "parent" for purposes of 14 V.S.A. § 2645, one of our guardianship statutes. Again, we stress that the difficulty in interpretation in this context arises because the Legislature has not addressed assisted reproductive technologies. Thus, we cannot discern in the parentage statutes any helpful legislative intent for such familial circumstances.

¶ 56. Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth. The other factors include the following. It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent. The sperm donor was anonymous and is making no claim to be IMJ's parent. If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial

insemination. See generally People v. Sorensen, 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495 (1968). Because of the equality of treatment of partners in civil unions, the same result applies to Lisa. 15 V.S.A. § 1204.

¶ 57. Virtually all modern decisions from other jurisdictions support this result, although the theories vary. See, e.g., Brown v. Brown, 83 Ark.App. 217, 125 S.W.3d 840, 844 (Ct.App.2003) (husband estopped from denying child support where husband knew wife was using artificial insemination to have child); Sorensen, 66 Cal.Rptr. 7, 437 P.2d at 498-500 (husband is lawful father of child conceived through artificial insemination born during marriage to child's mother); In re Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, 286-87 (Ct.App.1998) (finding virtually all decisions hold husband to be parent based on his consent to artificial insemination); In re M.J., 272 Ill.Dec. 329, 787 N.E.2d at 152 (mother of children conceived through artificial insemination may seek to establish paternity of man with whom she had ten-year intimate relationship based on theories of "oral contract or promissory estoppel"); Levin v. Levin, 645 N.E.2d 601, 604-05 (Ind.1994) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood of child); R.S. v. R.S., 9 Kan.App.2d 39, 670 P.2d 923,

928 (1983) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood); State ex rel. H. v. P., 90 A.D.2d 434, 457 N.Y.S.2d 488, 492 (1982) (wife estopped from denying husband's paternity where she fostered parent-child relationship); Brooks v. Fair, 40 Ohio App.3d 202, 532 N.E.2d 208, 212-13 (Ct.App.1988) (public policy disallows wife from denying paternity of husband where parties agreed during marriage to conceive via means of artificial insemination); In re Baby Doe, 291 S.C. 389, 353 S.E.2d 877, 878 (1987) (husband is legal father of child where he consented to artificial insemination of wife during marriage); see generally A. Stephens, Annotation, Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655 (1991). Some courts find the party a parent as a result of contract theory or estoppel. E.g., R.S., 670 P.2d at 928. Estoppel is often invoked because of the strong reliance interests that arise from consensual artificial insemination. Other courts reach the result more as a matter of policy, particularly stressing the adverse consequences of leaving the child without a parent despite the clear intention of the parties. E.g., Brooks, 532 N.E.2d at 212-13. We adopt the result in this case as a matter of policy, and to implement the intent of the parties.

¶ 58. This is not a close case under the precedents from other states. Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case. We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage. See People ex rel. R.T.L., 780 P.2d 508, 515 n. 11 (Colo.1989) ("We acknowledge that the presumption that a child born during wedlock is the legitimate child of the marriage was one of the strongest presumptions known to the common law."); Cicero v. Cicero, 58 A.D.2d 573, 395 N.Y.S.2d 117, 117 (1977) (presumption of legitimacy attached to "issue of the marriage"); LC v. TL, 870 P.2d 374, 380 (Wyo.1994) ("The presumption of legitimacy is one of the strongest in law."); see also Godin, 168 Vt. at 522, 725 A.2d at 910 ("Thus, the State retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origins.").

¶ 59. Lisa raises three additional reasons why we cannot affirm the temporary

visitation award. First, she argues that awarding Janet visitation, without a finding that Lisa is unfit to parent, interferes with her exclusive constitutional right to parent her child. See Troxel v. Granville, 530 U.S. 57, 72-73, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (indicating fundamental due process right of parents to make child rearing decisions). This argument was not adequately raised below and has been waived. See Will v. Mill Condo. Owners' Ass'n, 2004 VT 22, ¶ 4, 176 Vt. 380, 848 A.2d 336 (rejecting claim that mere mention of argument in one pretrial memorandum preserved issue for appeal). In any event, we reject it. Janet was awarded visitation because she is a parent of IMJ. Lisa's parental rights are not exclusive. See In re L.B., 155 Wash.2d 679, 122 P.3d 161, 178 (2005).

¶ 60. We have a similar response to Lisa's argument that Janet's parental status must be determined under Virginia law. Again, the argument was not preserved below. See Adams v. Adams, 2005 VT 4, ¶ 15, 177 Vt. 448, 869 A.2d 124 (arguments not raised below are not preserved for appeal). In any event, we also reject this argument. We have adopted the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 287 (1971) in determining choice-of-law questions. Id. (law of the state

with the most significant relationship to the child and parent determines legitimacy); see Myers v. Langlois, 168 Vt. 432, 434, 721 A.2d 129, 130 (1998). As we held in the first section, the Vermont court had jurisdiction to adjudicate custody and visitation of IMJ under both the PKPA and the UCCJA. Although these acts primarily determine jurisdiction, their provisions are such that they establish the state with the most significant relationship to a child custody or visitation dispute. Stubbs v. Weathersby, 320 Or. 620, 892 P.2d 991, 997-98 (1995). Accordingly, we conclude that where jurisdiction is exercised consistent with the PKPA and UCCJA, the law of the forum state is applicable. In this case, as discussed in depth supra, ¶¶ 9-18, Vermont had jurisdiction under both statutes, and, accordingly, Vermont law applies here.

¶ 61. In reaching this conclusion, we do not hold that there is an actual conflict between the law of Vermont and that of Virginia with respect to the power of the court to award visitation in cases involving same-gender partners. The parties have not pointed to any Virginia cases on point, and we have not found any. We do note, however, that a growing number of courts have recognized parental rights in a same-gender partner of a person who adopts a child or conceives through artificial insemination. See Elisa B.

v. Super. Ct., 37 Cal.4th 108, 33 Cal.Rptr.3d 46, 117 P.3d 660, 670 (2005) (same-gender partner is presumed mother of twins conceived by artificial insemination and is responsible for child support); In re E.L.M.C., 100 P.3d 546, 562 (Colo.Ct.App.2004) (same-gender partner who is psychological parent of child adopted by other partner may be awarded joint parental responsibilities); C.E.W. v. D.E.W., 845 A.2d 1146, 1151-52 (Me.2004) (court may award parental rights and responsibilities to same-gender partner who is de facto parent of child); E.N.O. v. L.M.M., 429 Mass. 824, 711 N.E.2d 886, 892-93 (1999) (probate court can provide visitation to same-gender partner of biological mother who is de facto parent of child); V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539, 552-54 (2000) (same-gender partner who is a psychological parent to child may be awarded custody of, or visitation with, the child); T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 920 (2001) (where same-gender partner is in loco parentis with consent of child's biological mother, court may award partial custody or visitation); Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I.2000) (court may award visitation to same-gender partner based on theory of estoppel); In re L.B., 122 P.3d at 176(same-gender partner who is de facto parent has same right to custody as biological mother); In re H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 435-37 (1995)

(same-gender partner with parent-like relationship with child can be awarded visitation, but not custody). In these cases, there was no marriage or civil union between the partners. This result was endorsed in 2000 by the American Law Institute. Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03, cmt. (b)(iii), at 114. It may be that the Virginia courts will follow this trend.

¶ 62. Lisa next argues that the court erred by awarding visitation without first determining parentage. Temporary relief requests in divorce or dissolution proceedings must be heard and decided promptly. 15 V.S.A. § 594a. Necessarily, a temporary order will not be based on the full record required to support a final order. A speedy decision was required in this case to allow Janet to have some contact with IMJ, pending resolution of the dispute over custody and visitation. Meanwhile, Lisa went through three lawyers during the early stage of the dissolution action. Her complaint alleged that Janet was a parent of IMJ, and she maintained that position through the first day of the temporary relief hearing. Indeed, her counsel stated on the record that Lisa waived any claim that Janet was not a parent of IMJ. Thereafter, with a new lawyer, she attempted to change her position, to roughly the position she espouses

here. She sought to delay the temporary relief proceeding while she adjudicated whether Janet was a parent, and she argued that the court should give no interim relief until parenthood was fully resolved. We believe the family court acted within its broad discretion in awarding temporary visitation as it did, even if it could not make a final determination of parentage. See id. (court can make such orders pending final hearing as it could upon final hearing); V.R.F.P. 4(c)(2).

¶ 63. In any event, the timing of the court's action was harmless in this case. The family court eventually ruled that Janet had parental status with respect to IMJ, a ruling we have affirmed. The relevant facts are largely undisputed and were before the court when it issued the temporary order. Lisa sought to delay the ruling on the basis that Janet was not the biological mother of IMJ, a fact that is undisputed and is not determinative. Thus, the timing of the court's action has no significance at this time. The Commonwealth of Virginia's judgment regarding parentage is not entitled to full faith and credit.

IV. Contempt

¶ 64. Finally, Lisa argues that we should reverse the contempt determination because

it is unsupported by the record. The transcripts show that on May 26, 2004, the trial judge granted Janet parent-child contact via a bench ruling issued on the record, and Janet's lawyer was to prepare a written order. The oral order provided for visitation for the weekends of June 4-6 and June 18-20, the week in July starting July 25, and one week per month in Vermont starting August 2004. The order also provided for Janet to have daily telephone contact with IMJ. At the hearing, Lisa explicitly stated that she waived any objection to the visitation on June 4-6, June 18-20, and for the week in July beginning July 25: "[W]e have no objection to the visitation proposed [regarding these dates] ...." Janet's lawyer filed the proposed order on May 28, but it was not signed and filed until June 17. Meanwhile, on June 9, Lisa filed a motion to reconsider the order, saying that it had been "issued from the bench." The written order, requiring the same visitation as previously had been ordered from the bench, was served on Lisa on June 25.

¶ 65. On June 5, 2004, despite the fact that the order had not yet been reduced to writing, Lisa complied with the visitation order for that weekend. Nonetheless, although the parties' versions of the reasons for the lack of visitation differ, Janet was not able to see the child as ordered on the

weekend of June 18 or during the week of July 25. Janet has not had parent-child visitation with IMJ since the weekend of June 4, 2004. Both the oral and written orders also provided that Janet could have telephone contact with IMJ "once per day," but Lisa did not allow this contact, and it did not occur. Janet moved for a determination that Lisa was in contempt of the court order, and the court held a hearing at which both Janet and Lisa testified. Lisa acknowledged at the contempt hearing that, even before an order had been issued by the Virginia court, she did not agree with the family court's visitation order, and had no intention of complying with it. On September 2, the Vermont court found that Lisa had failed to comply with the parent-child contact requirements, specifically finding that "Lisa has wilfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it."

¶ 66. Lisa makes no argument on appeal to justify her refusal to allow telephone contact between Janet and IMJ. At the contempt hearing, Lisa suggested that the telephone contact did not occur because the times during which Janet attempted to contact the child were inconvenient; Janet, in turn, stated that her numerous and repeated attempts always resulted in busy signals,

rebuffs by Lisa, and answering machines. Lisa acknowledges that Janet and IMJ did not actually converse on the telephone after the weekend of June 18, as was required per the temporary order.

¶ 67. Lisa argues on appeal that she did not violate the order with respect to the July visitation because Janet appeared at her home when she knew Lisa and IMJ would be at church. Again, the court's order was explicit that Janet was entitled to visitation starting on July 25, 2004, and the record is clear that the ordered visitation did not occur despite Janet's attempt.

¶ 68. With respect to the June visitation, Lisa makes a legal argument that she had no obligation to provide visitation because the written order had not been served upon her. Lisa's argument is disingenuous. The family court made the temporary visitation order orally from the bench and on the record on May 26, 2004. Lisa's presence at that hearing, with representation by counsel, is undisputed. Furthermore, at the hearing, Lisa explicitly stated through her attorney that she did not object to the June and July visitation dates. Lisa then further acknowledged the oral visitation order in her motion to set it aside. Lisa has not argued, and cannot argue, that she had no notice of the court's visitation order, nor does she

argue that it did not provide for visitation during the weekend of June 18. She argues only that a written order had not yet been served as of the June 18 visitation date.

¶ 69. We can find no requirement that a temporary visitation order be in writing, beyond the writing created by the transcript of an oral order placed on the record. We have recently affirmed a contempt adjudication based on an oral visitation order. See Root v. Root, 2005 VT 93, ¶ 13, 178 Vt. 634, 882 A.2d 1202 (mem.) (affirming contempt based on violation of oral order that reiterated preexisting obligation parent conceded was not followed); see also 15 V.S.A. § 603 (authorizing contempt proceedings for disobeying "lawful order," without reference to manner of order). We similarly conclude that the oral order and full notice to Lisa supported the contempt adjudication in this case.

¶ 70. Apparently, Lisa's response to her failure to comply with the August visitation provisions is that the Virginia decision superseded the Vermont order. We have rejected that argument as a matter of law. Moreover, Lisa could have complied with the Vermont order without violating any order from the Virginia court.

¶ 71. The family court found that Lisa had

"wilfully refused to comply with [its] order regarding visitation," and we find no reason to overturn that finding. See Payrits v. Payrits, 171 Vt. 50, 52-53, 757 A.2d 469, 472 (2000) (family court findings will not be overturned unless clearly erroneous). For the above reasons, we reject Lisa's arguments that the family court erred in finding her in contempt and remand for the imposition of sanctions.

¶ 72. In conclusion, the family court properly assumed jurisdiction of the action to dissolve the civil union between Lisa and Janet. The civil union was not void. The court properly found that it had jurisdiction to issue a temporary order providing Janet visitation with IMJ, and it was not required to recognize and enforce a conflicting decision of the Virginia court. Finally, the record supports the family court's decision that Lisa is in contempt of court for willfully violating the temporary visitation order.

Affirmed and remanded.

FN1. For clarity, we will refer to the parties by their first names.

FN2. Currently, California has a statute authorizing domestic partnerships, Cal. Fam.Code § 297 (West 2006), and Connecticut has a statute authorizing civil

unions, Conn. Gen.Stat. §§ 46b-38aa to 46b-38oo (2006).

FN3. This might be viewed as an unconventional application of the deference rule because civil union licenses are issued by town clerks and not by the Secretary of State and Commissioner of Health. Under the statutory scheme, however, the town clerks are acting under the guidance and direction of the secretary and commissioner. If the secretary and commissioner misconstrue the statute, the lives of many civil union applicants could be dramatically affected. Indeed, the report of the Vermont Civil Union Review Commission, discussed infra, ¶ 39, indicates that if we invalidated the officials' construction of the statutory scheme in favor of Lisa's interpretation, it is likely that the vast majority of civil unions, numbering in the thousands, would be declared void were the provisions of 15 V.S.A. § 6 now applied to civil unions. We find this to be more evidence that we are effectuating the Legislature's intent on this point.

FN4. Lisa's argument assumes that the court could not issue a temporary visitation or custody order pending a determination of parentage in a civil union dissolution proceeding. The dissolution proceeding is subject to the same procedures as a divorce

proceeding. 15 V.S.A. § 1206; V.R.F.P. 4(a)(1). The Legislature has provided broad authority to award temporary relief in a divorce. 15 V.S.A. § 594a; see also V.R.F.P. 4(c)(2). Generally, the procedures applicable to a divorce are applicable to a parentage action. V.R.F.P. 4(a)(1). Thus, we are not prepared to accept Lisa's assumption. In any event, the facts are generally undisputed, and, as we hold in the text, the issue is one of law so it does not matter when the parentage determination was made in this case.

FN5. As we noted in Godin, the presumption of paternity of the husband of the mother originated at common law. 168 Vt. at 521-22, 725 A.2d at 909-10 (citing numerous historical common-law conclusions and principles for finding parentage as to both legal spouses for the child born in that union). Prior to the adoption of the recent statute, we did not have the opportunity to determine whether Vermont would recognize the common-law presumption. In view of the limited purpose of the statute--to facilitate the collection of child support--it is possible that any common-law presumption would survive. Nonetheless, we need not rely on a presumption here because the court had sufficient facts before it to determine that Janet was the parent of IMJ without the aid of a presumption.

FN6. Lisa's argument presumes that "natural" means biological. She bases that argument on our opinion in Godin, although that decision does not contain that holding explicitly. We note that other courts have not always equated these terms. E.g., In re Nicholas H., 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, 937 (2002).

APPENDIX I

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. F454-11-03 Rddm

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed June 17, 2004.

TEMPORARY ORDER RE: PARENTAL RIGHTS & RESPONSIBILITIES

This matter came on for hearing before the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this

matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.

2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:

a) JUNE 2004: From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.

b) JULY 2004: From 07/25/04 through 07/31/04. Visitation shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact and the Plaintiff shall be responsible for transporting the child at

the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.

c) AUGUST 2004 and THEREAFTER: The Defendant shall have parent-child contact with Isabella in Vermont for the third full week of each month, beginning in August of 2004. Said visitation shall begin on a Saturday morning and end on Sunday evening. The Defendant shall be responsible for transporting the child from the Plaintiff's home in Winchester, Virginia, to her home in Fair Haven, Vermont, and the Plaintiff shall be responsible for transporting the child at the end of the parent-child contact period from Defendant's residence in Fair Haven, Vermont, to her residence in Winchester, Virginia.

d)OTHER TRANSPORTATION ARRANGEMENTS: Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

e) TELEPHONE CONTACT: The Plaintiff shall be permitted to have telephone

contact with Isabella while she is with the Defendant once per day. The Plaintiff and Defendant will work out an appropriate time for such telephone contact having in mind Isabella's schedule. The Defendant shall have telephone contact with Isabella on a per-day basis when the child is with the Plaintiff. Similarly, the Plaintiff and Defendant shall work out a time when such contact shall take place and be appropriate considering Isabella's schedule.

3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

s/William Cohen
Judge(s)- Rutland Family Court

APPENDIX J

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed November 17, 2004.

RULING ON PLAINTIFF'S MOTION TO WITHDRAW WAIVER TO CHALLENGE PRESUMPTION OF PARENTAGE

Plaintiff and defendant are parties to a Vermont civil union seeking dissolution of that union. The present dispute concerns this court's temporary order of parental rights and responsibilities concerning the minor child IMJ, born during the parties' civil union. The matter presently before the court is Plaintiff Lisa Miller-Jenkins' motion to

withdraw a "waiver" to challenge the presumption of Defendant Janet Miller-Jenkins' status as a parent of the minor child IMJ. FN1

Procedural Facts

The procedural facts and history of this case are both relevant to the motion and necessary to understand the context of these proceedings. Lisa initiated the action in this court by filing a complaint for civil union dissolution on November 24, 2003. In her pro se complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. She requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact (supervised), and award payment of child support. Janet requested a temporary order on the issues of parental rights and responsibilities, parent-child contact and property division. Janet also filed an answer and counterclaim, acknowledging that IMJ was a child of the civil union, and seeking that the court award legal and physical rights and responsibilities to her and give Lisa suitable parent/child contact.

Lisa's first attorney, Linda Reis, entered an appearance on Lisa's behalf on January 9, 2004. The hearing for a

temporary order was set for February 25, 2004, and then rescheduled for March 15, 2004 on the plaintiff's request that there was not enough time allocated on the February date. A few days prior to the March hearing, Attorney Reis moved to withdraw as Lisa's attorney, stating that Lisa had hired other counsel and instructed her to discontinue work on her case. This court granted the motion conditioned upon the temporary hearing scheduled for March 15 not being continued. Lisa's second attorney, Deborah Lashman, entered an appearance on Lisa's behalf on March 12, 2004.

In a prior status conference, Attorney Reis had raised the question of parental status in the civil union context. At the start of the March 15 hearing, the court asked whether Lisa was still raising that as an issue. Attorney Lashman responded that her interpretation of the law was different from Attorney Reis', and that she believed that because the child was born of the civil union, the presumption was that both parties were legal parents. In answer to the court's inquiry, Attorney Lashman represented that her client was waiving the issue. The court proceeded with the hearing. This discussion took place in the courtroom, on the record, while Lisa was present.

Although the March 15 hearing on the

temporary order lasted several hours, testimony was not completed. The matter was continued and scheduled for completion on May 26. On May 3, Attorney Lashman moved to withdraw on the grounds of a "material breakdown" in the attorney/client relationship. She also sent to the court a notice of pro se appearance signed by Lisa. On May 14, Lisa filed a motion form with the court asking that Janet be held in contempt of a prior order relating to property issues and requesting a hearing for the purpose of revoking her waiver to challenge parentage. On May 17, Lisa moved to continue the May 26 hearing on the temporary order. The court denied the motion. On May 26, the day of the continued hearing, Lisa's third attorney, Judy Barone, entered an appearance on Lisa's behalf and filed a "Motion to Withdraw Waiver to Challenge Presumption of Parentage." The court declined the request to halt the proceedings and testimony resumed, which resulted in a temporary order granting Lisa sole physical and legal custody and granting Janet parent-child contact. Lisa's motion regarding the "waiver" was set for a hearing before the court on August 24.

The motion asks the court to determine whether Lisa's "waiver" of the parentage issue through her second counsel was valid. Lisa's claim is that her second counsel waived the issue without her knowing

consent and without an adequate explanation of how the law in Vermont would apply to the facts of this case. While the "waiver" itself is the focus of the motion before the court, the particular relief sought by Lisa's motion and the legal arguments put forth by Lisa in support of such relief require the court to examine the law of parentage applicable to the facts of this case.

The motion filed on the second day of the temporary hearing sought a discontinuation of the proceedings and asked for time for counsel to brief the court on the "matter of Plaintiff's rebuttal to the presumption of parentage." Plaintiff's request at the hearing, and in subsequent motions, was not simply to have an opportunity to present evidence to rebut a presumption of parentage prior to a final hearing in this case. Rather, she requested that the court postpone the proceedings that had already been delayed more than two months and decline to enter any order of temporary visitation. This request was denied. Subsequently, plaintiff has requested that the court set aside its temporary order – thereby curtailing any enforceable right of Janet to have parent-child contact and depriving her of any parental interest – until such time that the court has an opportunity to hear and render a determination on whatever factual evidence Lisa might have to

rebut this presumption.

Moreover, Lisa has raised legal arguments as to whether any presumption of parentage could apply to the facts of this case and whether the court even has jurisdiction to determine parentage where Janet has not initiated a parentage action. The nature of Lisa's arguments leads the court to conclude that Lisa's challenge to Janet's status as a parent is a question of law, rather than one of disputed facts. Thus, the court will first attend to the legal arguments based on the facts of this case before considering the merits of Lisa's motion and her request for relief.

Background Facts

While the court has not taken evidence specifically in the context of a "parentage" hearing, both parties testified extensively at the hearing on the temporary custody order about their relationship and the conception of IMJ. The following facts were evident from the testimony of the parties, and do not appear to be disputed:

1. The plaintiff Lisa Miller-Jenkins is currently a resident of the Commonwealth of Virginia.

2. The defendant Janet Miller-Jenkins

is currently a resident of the State of Vermont.

3. In December of 2000 while both plaintiff and defendant were residents of Virginia they traveled to Vermont and obtained a civil union.

4. Both parties entered the civil union freely and voluntarily and did so to create a legal commitment to each other.

5. Both parties returned to Virginia as spouses.

6. The parties made a joint decision to employ artificial (alternative) insemination in order to have a child and to have a family.

7. This decision was jointly made and agreed to by both parties while they were legally connected by the civil union.

8. The parties made a joint decision to have Lisa be the bearing mother.

9. Both parties participated in the selection process of an anonymous sperm donor through a sperm bank.

10. Both parties participated in the decision to have the sperm donor's physical characteristics resemble those of the non-

bearing mother, Janet.

11. Lisa became pregnant through the use of the sperm bank procedure and gave birth to IMJ on April 16, 2002.

12. Janet was present for the entire delivery and cut the umbilical cord.

13. The child was born while both parties were united by civil union.

14. The artificial insemination took place in Virginia.

15. The child was delivered in Virginia.

16. The parties made a joint decision to relocate from Virginia to the State of Vermont to raise IMJ because of Vermont's Civil Union law and its rights, privileges and responsibilities. The decision to relocate was also due to the perceived inhospitality of the Commonwealth of Virginia to a same-sex couple with a child.

17. The parties moved to Vermont in August of 2002.

18. Both parties resided in Vermont until they separated in September of 2003. At that time, Lisa moved back to Virginia.

19. Janet Miller-Jenkins is not a biological parent of IMJ.

20. Janet Miller-Jenkins did not adopt IMJ.

Discussion

As stated above, the relief sought by the plaintiff and the premise of her argument requires an examination of the law regarding parental status in Vermont. The premise of plaintiff's argument is that there are only two ways in which one can be a parent under Vermont law: a biological connection or adoption. That Janet does not have a biological connection to IMJ and that Janet did not adopt IMJ has never been disputed. FN 2

Under Vermont law, "parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." 15 V.S.A. § 1204(a). "A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law." Id. §

1204(b). "The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to the parties to a civil union." Id. § 1204(d). "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." Id. § 1204(f). "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage...." Id. § 1206.

The clear instructions of the Vermont legislature is that this court may not treat parties to a civil union different from parties to a marriage. The court first addresses Lisa's argument that the court does not have jurisdiction to consider the issue of parentage because neither party has initiated a "parentage proceeding" in accordance with 15 V.S.A. §§ 301-308. This assertion ignores the procedural facts of this case. Lisa requested in her signed complaint for civil union dissolution that the court determine the parental rights and responsibilities of the

minor child, that the court award her sole physical and legal rights and responsibilities, that the court award Janet parent/child contact and that the court award child support. She also identified the child as a biological or adoptive child of the civil union.

Vermont's statute governing proceedings contains a statement that "a person alleged to be a parent shall be rebuttably presumed to be the natural parent of the child if ... the child is born while the husband and wife are legally married to each other." 15 V.S.A. § 308(4). The presumption that a child born while two people are married is the legitimate child of the marriage has a long tradition in the common law. See Godin v. Godin, 168 Vt. 514, 521 (1998) (noting the statutory presumption in 15 V.S.A. § 308(4) and discussing the origin of the presumption as one of the strongest and most pervasive of presumptions in the common law, citing In re Findlay, 170 N.E. 471, 472 (N.Y. 1930)). From the uncontested assertions in the complaint and answer, as well as the uncontroverted testimony that the child was born while the parties were united in a civil union, the law will presume that the parties to a civil union are the parents of that child, just as the court would so presume the parental status of a married couple initiating a divorce and custody action and

acknowledging the child as being born during the marriage. To not recognize the presumption would violate the mandate of the civil union law.

In the context of a child born to a marriage where at least one party requests the court to determine custody and support issues in conjunction with the divorce action, it is incumbent upon the party either denying his or her own status as a parent, or in attempting to deny the parental interest of the other spouse, to initiate that challenge. That is the benefit of the presumption. Thus, it is not necessary that there be a corresponding parentage action every time the court is asked to determine parental rights and responsibilities with regard to a child born of a marriage. When parentage is not challenged, the result is that the parentage is determined by the nature of the proceedings as a matter of law. See Godin, 168 Vt. at 521. fn 2. In such a case, the court need only determine that the child was born during the marriage.

Lisa argues that Lawrence v. Limoge, 149 Vt. 569, 572-73 (1988), stands for the proposition that this court lacks jurisdiction over the issue of parentage in this case. Lawrence involved an unmarried putative father seeking visitation rights based on the Uniform Child Custody Jurisdiction Act. The

Court determined that the trial court lacked jurisdiction over the issue of parentage where the putative father brought the proceeding solely only the basis of the UCCJA, a statute intended to resolve jurisdictional disputes, and not under the Parentage Proceedings Act. Id. However, in this case, Janet is not simply a putative, or "alleged" parent, she is a presumed parent by virtue of the civil union. The court declines to stretch the holding in Lawrence to adopt Lisa's position that the issue of parentage is not implicit in a custody or child support action between parties to a marriage or a civil union involving a child born during the marriage or civil union.

Lisa next argues that the presumption must be deemed inapplicable based on the facts of this case because it is undisputed that there is no biological connection between Janet and IMJ. This argument depends on a narrow interpretation of Vermont's statute on parentage proceedings. Under Lisa's interpretation, once she established that Janet has no biological connection to IMJ, has not adopted IMJ, and has not completed a "Voluntary Acknowledgment of Parentage form," FN 3 under 15 V.S.A. § 308 there can be no presumption of parentage. The court does not construe the statute to delineate the only ways in which one can be a parent under

Vermont law, nor to dictate that the legal presumption can be defeated by genetics alone. See Godin, 168 Vt. at 522 ("Indeed, the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to the 'biology' of the presumed parent have become more common.").

Parties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife who, unable to conceive a child biologically, choose to conceive a child by inseminating the wife with the sperm of an anonymous donor. The issue of parental status of a child conceived through artificial insemination is one of first impression in Vermont. Under Lisa's interpretation of the law, because there is no established precedent in Vermont, the husband would no more than a mere stepparent and would be required to adopt the child so conceived in order to be considered a parent in the eyes of the law. This argument is without merit.

While Vermont has not yet been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination, the issue is not a new one in the common and statutory law of other states. See M. Yaworsky, Annotation, Rights

and Obligations Resulting From Human Artificial Insemination, 83 A.L.R. 4th 295, 301 (1991) ("Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any Child born as a result of the insemination, for all purposes. Where this result is not dictated by statute it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel."). In In re Adoption of Anonymous, 345 N.Y.S.2d 430 (N.Y. Surr. Ct. 1973), for example, a mother asserted that her former husband's consent was not required for her new husband to adopt the child born of the previous marriage on the basis that the former husband was not a parent of the child conceived through artificial insemination. The court disagreed and required the former husband's consent, holding that a child born of artificial insemination of the mother by semen of anonymous third party donor with consent of her husband during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage, and that the husband is a lawful parent of the child. Id. At 435-36. See also People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968) (holding that ex-husband, who consented during the marriage to artificial insemination of his wife with sperm of anonymous sperm donor, was the lawful

father of the child thereby conceived and responsible for support of the child). The Sorensen court reasoned that when a child born of a marriage is conceived by an anonymous sperm donor, there is no "natural" father, and the court can only look for a "lawful" father. Id. at 498

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relationship to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.

Id. at 499.

The court adopts the reasoning of other courts that have determined that where a

legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology. As set forth in the facts above, both parties testified that they had the intent to create a family unit when they jointly agreed to the conception of IMJ.

While Lisa may be correct in her assertion that had Janet adopted IMJ this entire issue could have been averted, the question is not whether Janet could have adopted IMJ, but whether the law would require her to do so in order to protect her parental interest. As the legislative findings noted in Vermont's Civil Union Statute state:

> (7) The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.
> (8) Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.
> (9) Despite longstanding social and economic discrimination, many gay and lesbian

> Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for families together, just as do couples who are married under Vermont law.

Legislative Findings, 1999, No. 91 (Adj. Sess.) § 1 (eff. April 26, 2000). This court can not impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not impose this obstacle upon a party to a civil union who makes that same choice. FN 4

Finally, we reach the question of whether Attorney Lashman's representations that parentage was not an issue and that Lisa "waived" the issue should be set aside and the temporary order vacated. Pursuant to the foregoing analysis, even if this court determines that Lisa should retain the right to challenge Janet's status as a parent, she has not demonstrated that there are any

facts requiring judicial resolution that would or could destroy Janet's status as a lawful parent. FN5 The evidence presented at the hearing on this motion consisted of testimony of Lisa's and the various attorneys' understanding of the law, as opposed to any factual basis upon which to rebut the presumption of parentage. This court was justified in proceeding with a hearing already in progress on a temporary order to establish visitation based on the undisputed testimony in this case and the representations of both Lisa and her counsel that IMJ was a child of the civil union and that parentage was not an issue. Lisa has not raised any legal or factual argument that would lead this court to believe that if the issue of parentage were litigated prior to the temporary order that the outcome would be any different. The court is not persuaded that there is any legal or factual basis to vacate the temporary order granting visitation rights to Janet.

ORDER

Based upon the above this court must recognize a legal parental interest in both parties to this civil union. Parentage by Lisa and Janet was presumed by Vermont law when this matter was filed. Given her own representations and testimony, Lisa has failed to demonstrate that there is any basis

for a factual hearing to rebut that presumption. Accordingly, this court will recognize a parental interest in both Lisa and Janet. The temporary order remains in full force and this case is to be set for a final hearing on parental rights, property and child support. FN6

Dated at Rutland, Vermont, this 17th day of November, 2004.

s/William D. Cohen
Hon. William D. Cohen
Family Court Judge

FN1 The court will refer to the parties by their first names for ease of identification and will identify the minor child only by initials.

FN2 The court has previously denied plaintiff's motion to require Janet and IMJ to submit to genetic testing. It has never been disputed that Janet has no "genetic" connection to the child. Plaintiff's motion was simply an extension of her legal argument that Janet cannot be considered a parent without a genetic connection.

FN3 See 15 V.S.A. § 307 (describing a procedure for *unmarried* parents to acknowledge parentage by filing a Voluntary

Acknowledgment of Parent form with the department of health).

FN4 It is noteworthy that Vermont law requires the consent of a husband, or a party to a civil union, to any adoption of a child born during a marriage or civil union. See 15 V.S.A. § 2-401 (consent to adoption in Vermont requires consent by the woman who gave birth, the biological father, and "a man who is or has been married to the woman if the minor was born during the marriage"); 15 V.S.A. § 1204(b) (party to civil union included in any terms that denote the spousal relationship, as those terms are used throughout the law.)

FN5 It bears notation that some states have recognized parental and visitation rights of a same-sex partner on the basis that the non-biological partner was a "de facto" parent where the couple utilized artificial insemination to have a family. See, e.g., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004). This court's decision is not based on Janet's status as a "de facto" parent, which, in jurisdictions that so recognize such status; typically focuses on the psychological and caretaking role that one has in the child's life. This court's analysis is based on Janet's status as a *legal* parent. See also Titchenal v. Dexter, 166 Vt. 373, 376 n.1 (1997) (distinguishing claims of "de facto" parent

and "in loco parentis" as opposed to claim as a legal parent). This court's determination of parental status is based on Janet's role as a party to a civil union in the joint decision to conceive and raise the child during that union, not on her conduct subsequent to the child's birth.

FN6 As discussed in an earlier ruling in this case, the court is aware that Lisa initiated a parentage action in Virginia while the litigation initiated by her in this court was still pending. See Order, Sept. 2, 2004, at 5-6. As discussed above, this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1301 et seq., Va. Code Ann. §§ 20-146.1 et seq. and the federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A(f). See Order, Sept. 2, 2004, at 5-6. Lisa has also recently filed an action seeking this court to recognize a final order issued by the Virginia court declaring her to be IMJ's sole legal parent and declaring Janet to have no claim of parentage or visitation rights over IMJ. That filing is waiting a response, and will be addressed at a separate time. However, the court notes the full, faith and credit requirement of the United States Constitution, U.S. Const. art. IV, § 1, only

applies where the court issuing the judgment had jurisdiction to enter it. See Poston v. Poston, 160 Vt. 1, 5 (1993) (citing Williams v. North Carolina, 325 U.S. 226, 229 (1942)).

APPENDIX K

Virginia

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 1st *day of* July, 2008.

Lisa Miller-Jenkins, Appellant,

against Record No. 070933
Court of Appeals No. 0688-06-4

Janet Miller-Jenkins, Appellee,

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

For reasons stated in writing and filed with the record, the Court is of the opinion that there is no error in judgment appealed from. Accordingly, the judgment is affirmed.

This order shall be certified to Court of Appeals of Virginia and the Circuit Court of Frederick County.

A Copy,
Teste:
\s\ Patrica L. Harrington
Clerk

APPENDIX L

ARTICLE I
BILL OF RIGHTS

Section 15-A. Marriage.

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

APPENDIX M

UNITED STATES CODE

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX N

UNITED STATES CODE

28 U.S.C. § 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term -

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders

and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if -

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State

(i) is the home State of the child on the date of the commencement of the proceeding, or

(ii) had been the child's home State within six

months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)

(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because

(I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such a State, and

(II) there is available in such State

substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and

(i) the child has been abandoned, or

(ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D)

(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to

determine the custody or visitation of the child, and

(ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if–

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other Sate is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

APPENDIX O

UNITED STATES CODE

28 U.S.C. § 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

APPENDIX P

VERMONT STATUTES

15 V.S.A. § 1204 Benefits, protections and responsibilities of parties to a civil union

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

(e) The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety);

(2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;

(5) group insurance for state employees under 3 V.S.A. § 631, and continuing care contracts under 8 V.S.A. § 8005;

(6) spouse abuse programs under 3 V.S.A. § 18;

(7) prohibitions against discrimination based upon marital status;

(8) victim's compensation rights under 13 V.S.A. § 5351;

(9) workers' compensation benefits;
(10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights under 18 V.S.A. chapter 42 and the Nursing Home Residents' Bill of Rights under 33 V.S.A. chapter 73;

(11) advance directives under 18 V.S.A. chapter 111;

(12) family leave benefits under 21 V.S.A. chapter 5,
subchapter 4A;

(13) public assistance benefits under state law;

(14) laws relating to taxes imposed by the state or a municipality;

(15) laws relating to immunity from compelled testimony and the marital communication privilege;

(16) the homestead rights of a surviving spouse under 27 V.S.A. § 105 and homestead property tax allowance under 32 V.S.A. § 6062;

(17) laws relating to loans to veterans under 8 V.S.A. § 1849;

(18) the definition of family farmer under 10 V.S.A. § 272;

(19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 V.S.A. § 5240;

(20) state pay for military service under 20 V.S.A. § 1544;

(21) application for early voter absentee ballot under 17 V.S.A. § 2532;

(22) family landowner rights to fish and hunt under 10 V.S.A. § 4253;

(23) legal requirements for assignment of wages under 8 V.S.A. § 2235; and

(24) affirmance of relationship under 15 V.S.A. § 7.

(f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

APPENDIX Q

CODE OF VIRGINIA

§ 20-45.3. Civil unions between persons of same sex

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

APPENDIX R

CODE OF VIRGINIA

§20-158. Parentage of child resulting from assisted conception (in relevant part).

A. Determination of parentage, generally. - Except as provided in subsections B, C, D, and E of this section, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

1. The gestational mother of a child is the child's mother.

2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.

3. A donor is not the parent of a child

conceived through assisted conception, unless the donor is the husband of the gestational mother.

111 (2)

No. 08-306

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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INTRODUCTION

For the fifth time, Petitioner Lisa Miller has submitted to this Court a petition for a writ of certiorari regarding her custody dispute with Respondent Janet Jenkins. The Court rejected all previous petitions: the Clerk rejected the filing of one of the previous four as improperly seeking review from a state intermediate court; the Court denied the other three petitions. Respondent respectfully submits that this petition should meet the same fate, both because of what the petition is, an attack on Virginia's procedural rules, and what it is not, a compelling or even legitimate argument for review by this Court.

The petition is an assault on Virginia's right to enforce a basic procedural rule that one who loses an argument in a matter that becomes final due to procedural default cannot resurrect that argument in the same or subsequent litigation between the same parties. Here, the ruling of the Virginia Supreme Court from which Petitioner seeks certiorari holds that Petitioner is bound by the Virginia Court of Appeals' decision in *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006), App. 27a-48a[1] ("*Miller-Jenkins I*"), which Petitioner failed to appeal properly. This Court has been clear that it will honor regular state rules of procedure and refuse to provide a forum when the petitioner has procedurally defaulted in state court.

---

[1] All "App." references are to the Appendix to this Petition for Writ of Certiorari, filed September 4, 2008, unless otherwise indicated.

What is completely absent from the Petition is any reason why this Court's involvement would be necessary to resolve the substantive issue decided in *Miller-Jenkins I*, even if such review were procedurally proper. That decision held that the Parental Kidnapping and Prevention Act (28 U.S.C. § 1738A, the "PKPA") required Virginia to respect Vermont custody orders because proceedings began in Vermont, irrespective of public policy arguments or the Defense of Marriage Act (28 U.S.C. § 1738C, "DOMA"). Petitioner fails to cite any case with a contrary holding, and indeed the case law is unanimous that (1) the PKPA does not permit a state to invoke public policy to ignore the statute's terms; and (2) DOMA is not implicated in the absence of a marriage. No marriage is involved here. Because review by this Court would be procedurally improper and substantively unnecessary, Respondent submits that the petition for certiorari should be denied.

STATEMENT OF THE CASE

This case began in November 2003, when Petitioner Lisa Miller-Jenkins ("Lisa"), filed a complaint in the Rutland County Family Court in Vermont ("Vermont Court"), to dissolve her Vermont civil union with Respondent Janet Miller-Jenkins ("Janet"), and to adjudicate the parental rights and responsibilities over the couple's child, IMJ. In June 2004, the Vermont Court issued a Temporary Custody Order granting Lisa primary physical custody over IMJ and granting Janet visitation rights. The Vermont Court continued to exercise its jurisdiction over the custody and visitation issues and ultimately determined that both Janet and Lisa were legal parents of IMJ, and that Lisa was in

contempt of court for refusing to allow Janet visitation with the couple's daughter. On August 4, 2006, a unanimous Vermont Supreme Court affirmed the Vermont Court's orders. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). From that decision, Lisa sought a writ of certiorari from this Court, which was denied on April 30, 2007. *Id.*

First Appeal in Virginia. Rather than comply with the June 2004 order of the Vermont Court awarding Janet visitation rights, Lisa filed a new action in the Frederick County Circuit Court in Virginia ("Circuit Court"), asking that court to rule that she was the sole parent and the only person with custodial and other parental rights over IMJ. On October 15, 2004, the Circuit Court dismissed out of hand Janet's jurisdictional objections under the PKPA, 28 U.S.C. § 1738A, and, under Virginia law, ruled that Lisa was the only parent of IMJ and that neither Janet "nor any other person has any claims of parentage or visitation rights over [IMJ]." *See* App. 27a of the Petition For Writ of Certiorari, November 19, 2007.

Janet appealed that decision and, on November 28, 2006, the intermediate Court of Appeals of Virginia ("Court of Appeals") unanimously reversed the Circuit Court's assumption of jurisdiction in the case, holding that Vermont had sole jurisdiction over the case pursuant to controlling federal law. In a comprehensive, published opinion, the Court of Appeals held that, under the PKPA, "the [Virginia] trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and

visitation orders of the Vermont court." *Miller-Jenkins I*, 49 Va. App. at 98, 637 S.E.2d at 335, App. 39a. The Court of Appeals also directed the Circuit Court "to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338, App. 47a.[2] On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc*. *See* App. 57a of the Petition For Writ of Certiorari, November 19, 2007. Lisa sought to appeal to the Supreme Court of Virginia, but was informed by the Clerk of the court that her appeal was procedurally improper. Lisa then submitted a petition for certiorari to this Court, which the Clerk of this Court returned without filing because the challenged decision was not from the state's highest court. The Virginia Supreme Court dismissed Lisa's appeal on May 7, 2007, for her failure file a Notice of Appeal as required by the Rules of the Supreme Court of Virginia. *See* App. 20a of the Petition For Writ of Certiorari, November 19, 2007. Lisa again submitted a petition of certiorari to this Court, substantively identical to this Petition, except for her attempt to have this Court ignore her procedural default. *Compare* Petition for Writ of Certiorari, November 19, 2007, at 1 n.1 with Petition for Writ of Certiorari (September 4, 2008) at 32-36. This Court denied certiorari on January 22, 2008.

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[2] Like the Virginia Court of Appeals, a unanimous Supreme Court of Vermont has also concluded that, under the PKPA, Vermont has sole and continuing jurisdiction over this custody matter – a decision this Court already has declined to review. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007).

Second Appeal in Virginia. While the Virginia Court of Appeals was considering the First Appeal, Janet sought to register the Vermont custody order in the Frederick County Juvenile and Domestic Relations Court ("J&DR Court"). The J&DR Court registered the order, but on March 1, 2006, the Circuit Court reversed. Janet appealed and, on April 17, 2007, in a two-page, unpublished opinion, a unanimous panel of the Court of Appeals reversed the Circuit Court's refusal to register the Vermont custody order, finding that this result was mandated by the Court of Appeals' prior decision:

> "[i]n light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case, Record No. 0688-06-4. Accordingly, we likewise vacate the trial court's March 1, 2006 order and remand the case to the trial court with instruction to enter an order allowing Janet Miller-Jenkins to register the Vermont order in Virginia."

See App. 16a.

Lisa timely appealed that decision to the Virginia Supreme Court, which unanimously held that Lisa was barred from attempting to relitigate the issues decided against her in *Miller-Jenkins I*. *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 661 S.E.2d 822 (2008), App. 1a-13a ("*Miller-Jenkins II*").

REASONS FOR DENYING THE PETITION

I. Because the Decision Below Rested on an Independent and Adequate State Procedural Ground, the Petition Should Be Dismissed.

As the Virginia Supreme Court held, and as a comparison of the certiorari petitions reveals, every substantive issue Lisa raises in her Petition in this case was decided by the Virginia Court of Appeals in *Miller-Jenkins I*. *Miller-Jenkins II*, 276 Va. at 27, 661 S.E.2d at 827, App. 11a ("We agree with the Court of Appeals' conclusion that each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal."). *Miller-Jenkins I* determined that Vermont had jurisdiction over the dispute under the PKPA, notwithstanding DOMA or the Virginia Marriage Affirmation Act. 49 Va. App. at 102, 637 S.E.2d at 337, App. 44a-45a. Lisa failed to perfect her appeal in *Miller-Jenkins I* to the Virginia Supreme Court, and the Court of Appeals decision became final. 276 Va. at 24, 661 S.E.2d at 825, App. 5a; *Id.* at 29, 661 S.E.2d at 827, App. 13a (Hassell, J., concurring) (Lisa "failed to perfect an appeal from that decision in the manner required by law."). In *Miller-Jenkins II*, the Virginia Supreme Court, invoking the state law doctrine of law of the case, refused to allow Lisa to re-litigate those issues in a collateral appeal on the separate but related issue of enforcement. Because there is no federal question for this Court to review, the Petition should be dismissed.

A. This Court Does Not Have Jurisdiction to Review Cases Decided by State Courts on State Grounds.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Review is precluded "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* noted the Court's history of respecting the rules of lower federal courts and stated plainly, "No less respect should be given to state rules of procedure." *Id.* at 751. *Coleman* reflected this Court's longstanding respect for the right of state courts to set forth and enforce their appellate procedural rules:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197, 11 S.Ct. 519, 35 L.Ed. 144; *Brown v. Commonwealth of Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546; *Jacobi v. State of Alabama*, 187 U.S. 133, 23 S.Ct. 48, 47 L.Ed. 106; *Hulbert v. City of Chicago*, 202 U.S.

> 275, 281, 26 S.Ct. 617, 618, 50 L.Ed. 1026; *Newman v. Gates*, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed. 385; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195, 29 S.Ct. 546, 548, 53 L.Ed. 963.' *John v. Paullin*, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381.

Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

The rule that this Court may not review state judgments decided on an independent state ground is based in the limitation of the Court's jurisdiction to "cases and controversies." U.S. Const. art. III § 2:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). That is precisely what would happen should this Court review the present case. Lisa's failure to appeal *Miller-Jenkins I* properly rendered that decision final. While this Court theoretically could determine that *Miller-Jenkins I* was incorrectly decided, the law of the case ruling in *Miller-Jenkins II* presupposes that the initial decision could be incorrect but holds that the initial decision is nonetheless binding as a matter of Virginia procedural

law. 276 Va. at 26, 661 S.E.2d at 826, App. 8a ("[N]othing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either.") (quoting *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620, 93 S.E. 684, 687 (1917)). Nothing this Court could say about the federal law would change the judgment of the Virginia Supreme Court from which Petitioner seeks review.

B. State Court Judgments Based on Law of the Case Are Not an Exception to the "Adequate and Independent State Ground" Rule.

Petitioner urges this Court to accept this case for review by arguing that this Court not respect the straightforward ruling of the Virginia Supreme Court that Petitioner, by losing her substantive arguments in *Miller-Jenkins I* and failing to appeal that decision properly, was barred from raising the same arguments again in her ongoing custody battle with Respondent. The Virginia Supreme Court's "law of the case" ruling constitutes an adequate and independent state ground for the judgment precluding certiorari. This Court's precedents reflect respect for a state rule holding that a litigant who fails to follow state procedural rules in appealing final judgments are precluded from raising the same issues in a subsequent proceeding.

Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44 (1915) illustrates the point. That case concerned an action to quiet title to a strip of land that the plaintiff claimed for use as a railroad pursuant to federal law. The trial court ruled in favor of the defendant, and the

plaintiff appealed. The state supreme court reversed, and directed the trial court to enter a judgment awarding the plaintiff a right of way over the disputed land. The trial court did so, but the plaintiff appealed again, "insisting that it was only adjudged to be the owner of a right of way when, according to the true effect of the right-of-way act, it had a title in fee simple. . . ." 239 U.S. at 46. The state supreme court rejected this argument based on the law of the case doctrine:

> If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is, the law of the case, and this court, as well as the litigants, are bound thereby.

Id.

This Court refused to accept the case for review. "Manifestly the first judgment was final," in that it "disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court." *Id.* at 47. "And as the question sought to be presented arises upon the

first judgment . . . , it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here." *Id.*

This case is no different from *Rio Grande Railway*. The issues sought to be reviewed here were finally adjudicated in *Miller-Jenkins I*. The Court of Appeals decision – which was not appealed in accordance with Virginia procedure – held that Vermont had jurisdiction over the matter, and remanded "with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court." 49 Va. App. at 103, 637 S.E.2d at 338, App. 47a. There was nothing left for the trial court to do but follow those instructions. Accordingly, the Virginia Court of Appeals and Supreme Court declined to allow Lisa to re-litigate the merits on the separate appeal dealing solely with the trial court's refusal to register a Vermont order, and this Court should do so as well.

The cases cited in Lisa's Petition are not to the contrary. Several of those cases deal with appeals to this Court from *federal* courts of appeal. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988); *Messinger v. Anderson*, 225 U.S. 436 (1912). These cases obviously have no bearing on whether a ruling based on law of the case represents an adequate and independent *state* ground barring review from a *state* court judgment.

The remaining cases cited in the Petition simply support the proposition that a "law of the case" ruling does not automatically preclude this Court's review, because in some "law of the case" rulings, preclusive

effect is given to an initial ruling that is not final and appealable to this Court. For example, *Washington ex rel. Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917), involved a condemnation action in which the defendant took an interlocutory appeal to the state supreme court to challenge the constitutionality of the state condemnation statute. The state supreme court upheld the statute, and remanded to the trial court for further proceedings. This Court refused to accept the case for review because the state court judgment was not final, but noted that the case could be brought before it again after the conclusion of state court proceedings:

> When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court as laying down the law of the case, this court will not be thus bound.

243 U.S. at 256-57. Similarly, in the other two cases cited in the Petition, this Court was not bound by a state supreme court's law of the case holding because the earlier state case that had decided the issue on review was a non-final decision, which was not immediately appealable to this Court. *See Reece v. Georgia*, 350 U.S. 85 (1955); *Davis v. O'Hara*, 266 U.S. 314 (1924). Thus, the Court's assumption of jurisdiction in these cases was based on the common sense recognition that "[b]ecause

we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). That concern has no relevance to this case or to cases, like *Rio Grande Railway*, in which a party attempts to re-litigate an issue that has already been subject to a final judgment on the merits.[3]

The Court explained this crucial distinction in *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432 (1923). In that case, the trial court granted a preliminary injunction to the plaintiffs, which was affirmed by the state supreme court on interlocutory appeal. On remand, a trial was held, and the plaintiffs prevailed on the merits. On appeal, the state supreme court held that its previous ruling on a particular issue was the law of the case, and could not be revisited. The defendants then sought review from this Court. The plaintiffs, citing *Rio Grande Railway*, argued that this Court was precluded from considering the case. But the Court distinguished *Rio Grande Ry.* on the basis that

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[3] Under Virginia law, a ruling can be given preclusive effect under the law of the case doctrine whether that ruling is a final judgment or not. *See Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S.E. 684, 687 (1917) (Law of the case "differs from res judicata, in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final."). Here, of course, the ruling of the Court of Appeals in *Miller-Jenkins I* was final and subject to appeal to the Virginia Supreme Court, and this Court, had Lisa followed proper procedures.

the first state supreme court case was a final adjudication:

> [In *Rio Grande Railway*, t]his court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a final decree, and it was upon this decree that the second writ of error was brought.

262 U.S. at 436-37.

In the present case, as in *Rio Grande Railway*, the first Virginia Court of Appeals decision was the final adjudication of the issues now raised in Lisa's Petition. Lisa failed properly to appeal that ruling, and was therefore precluded from seeking review from this Court. Like the state supreme court in *Rio Grande Railway*, the Virginia Court of Appeals and Virginia Supreme Court held, on state law grounds, that she could not raise the same issues in a subsequent proceeding. This Court accordingly does not have jurisdiction over this case.

C. Lisa's Contention That the Virginia Supreme Court's Law of the Case Doctrine Is Not an Adequate State Ground Because It Is Not "Strictly or Regularly Followed" Is Without Merit.

Petitioner argues that the Virginia Supreme Court's ruling in *Miller-Jenkins II* was too novel to constitute an adequate state procedural ground, because the law of the case principle was not "strictly or regularly followed." See Petition For Writ of Certiorari at 35, citing *Hathorn supra*, 457 U.S. at 263. Contrary to Petitioner's assertion, however, the law of the case doctrine is firmly established in the Virginia courts. *See Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 527 (1946) ("The [law of the case] doctrine has been applied in many cases by this court.... The principle here laid down is everywhere applied."); *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000) (it is "the established rule of appellate procedure in this Commonwealth that if a matter is appealed and a party fails to preserve a challenge to an alleged error" it becomes law of the case); *Searles' Adm'r v. Gordon's Adm'r*, 156 Va. 289, 295, 157 S.E. 759, 761 (1931) ("The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.") (citation omitted).

Nor is there anything novel about the way the doctrine was applied in this case. The Virginia Supreme Court explained that "[p]ursuant to the 'law of the case' doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that

decision during later stages of the 'same *litigation*.'" 276 Va. at 26-27, 661 S.E.2d at 826, App. 8a-9a (emphasis added) (*quoting Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181, 188 (2006). The court noted that "Lisa's petition and brief filed in this Court contain the identical assignments of error that she presented in her petition to this Court in the first Virginia appeal," 276 Va. at 27, 661 S.E.2d at 827, App. 10a, and concluded that "each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal." 276 Va. at 27, 661 S.E.2d at 827, App. 11a. Regarding Lisa's contention that the second appeal was not part of the same "case" as the first one, the court explained:

> Although Lisa and Janet separately filed the cases from which the two appeals arose, both cases involved these same parties and sought adjudication of the same issue, custody and visitation regarding IMJ. The two Virginia appeals were part of the "same litigation" seeking to resolve the single question which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute.

276 Va. at 28, 661 S.E.2d at 827, App. 12a.

Petitioner's challenge to the Virginia Supreme Court's "newly-minted 'law of the cases' doctrine" rests entirely on what label that court employed, rather than the substance of the longstanding procedural rule that was honored. See Cert. Pet. at 35 Petitioner argues that the "law of the case" doctrine can never be applied to separately-captioned matters, even if the parties and

issues are identical. *Id.*[4] However, Petitioner does not challenge the basic principle of issue preclusion applied in *Miller-Jenkins II*, that a party that loses an appeal that is rendered final by procedural default is precluded from raising those issues in that or any subsequent proceeding between the same parties. What Lisa quibbles about is whether the use of the "law of the case" label is appropriate where there are two simultaneous separately-captioned proceedings involving the same parties and issues. The Virginia Supreme Court viewed these proceedings as essentially the "same litigation," a term the Court had used previously, rendering the "law of the case" doctrine applicable. 276 Va. at 26-27, 661 S.E.2d at 826, App. 8a-9a. Of course, had the Virginia Supreme Court viewed the two cases as not part of the same litigation, it could have held Lisa's claims in the second appeal barred by res judicata. *See Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493 (1998) (holding second case barred by res judicata; "A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies."); *see also Bill Greever Corp. v. Tazewell Nat. Bank*, 256 Va. 250, 254, 504 S.E.2d 854 (1998) ("Judicially created doctrine of res judicata rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment

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[4] There are two proceedings because Lisa was required to file her parentage action (*Miller-Jenkins I*) in circuit court, while Janet was required to seek registration and enforcement of Vermont orders relating to custody and visitation, in the juvenile and domestic relations court (from which an appeal lies in the circuit court). See Va. Code Ann. § 20-146.26.

of parties.") (citation omitted); *see generally Steinman*, 121 Va. at 687 (the law of the case doctrine is "[c]losely akin to the doctrine of res judicata" and "it is at times confused with" res judicata). *Miller-Jenkins II*'s unremarkable application of issue preclusion principles is well-supported in Virginia law, and Petitioner "has failed to substantiate any claim that the [Virginia] courts in general apply this [rule] in an irregular, arbitrary, or inconsistent manner." *See Jimmy Swaggart Ministries v. Bd of Equalization of Cal.*, 493 U.S. 378, 399 (1990).

It bears emphasis that Petitioner had a more than adequate chance to seek review of these issues before this Court. Had she simply filed a notice of appeal from the Court of Appeals decision in *Miller-Jenkins I*, the Virginia Supreme Court could have ruled on the application of the PKPA and DOMA to this case. Because she failed to do so, the Virginia Supreme Court dismissed her appeal and later held that Petitioner could not relitigate the arguments in *Miller-Jenkins I*. Indisputably, that procedural default constituted an adequate and independent state law ground that barred a petition for certiorari from this Court. It cannot be the case that Petitioner can now get a second bite at the apple by spuriously attempting to re-litigate those issues, after final judgment on the merits had been reached, in a collateral enforcement proceeding.

II. Because Vermont and Virginia Have Reached the Same Decision, There Is No Compelling Reason To Grant Certiorari.

Because the procedural default below is jurisdictional, an evaluation of the merits of Lisa's position is unnecessary. Nevertheless, assuming *arguendo* that the case had not been decided on an independent and adequate state procedural ground, the Petition should also be denied because Lisa has failed to present any "compelling reason" warranting a grant of certiorari. *See* U.S. Sup. Ct. R. 10.

Both the Supreme Court of Vermont and the Court of Appeals of Virginia have unanimously rejected Petitioner's arguments, correctly holding that the PKPA governed the dispute and mandated that Vermont, where Lisa initially filed her custody action, retained jurisdiction despite Lisa's later efforts to change strategy and file in Virginia. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 958-59; *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. at 98, 637 S.E.2d at 335, App. 39a.

Both the Supreme Court of Vermont and the Court of Appeals of Virginia applied the straightforward jurisdictional provisions of the PKPA and reached the same decision: Vermont has jurisdiction.[5] Given that both

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[5] Certiorari is even less appropriate when one considers that the rulings in Vermont and Virginia that the PKPA applied irrespective of any argument about contrary public policy of the forum state are supported by all relevant prior case law. *Perez v. Tanner*, 332 Ark. 356, 367, 965 S.W.2d 90, 94-95 (1998); *In re Clausen*, 442 Mich. 648, 669, 502 N.W.2d 649, 657 (1993).

courts reached the same result, this case is directly opposite to the situation presented where state courts of last resort reach conflicting decisions on an important federal question, as contemplated by U.S. Sup. Ct. R. 10(b).

Additionally, even a cursory reading of the questions that Lisa presents to this Court for review demonstrates that the Petition is not worthy of being granted. Lisa presents both highly misleading and irrelevant contentions as part of her attempt to argue issues that are not actually presented by the Virginia proceedings:

- Lisa repeatedly intimates that Janet's parental rights "arose" or were "arising" out of the civil union. *See* Questions 1, 2. However, the Vermont Supreme Court was explicit that it was not recognizing Janet's parental rights based solely on the civil union and, in fact, that "[***m**]**any factors** . . . present here . . . support a conclusion that Janet is a parent." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (emphasis added);[6] *see also*

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[6] The court explained that among the factors demonstrating Janet's parenthood

> "are that . . . [i]t was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent

(Cont'd)

id. at 971 ("Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.").

- In an attempt to bolster the supposed relevance of DOMA, Lisa maintains that DOMA was enacted after the PKPA. *See* Question 1. Lisa neglects to mention that the PKPA was amended ***after*** DOMA specifically to clarify the PKPA's applicability to visitation orders, which is what is at issue in this case. *See* Pub. Law 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (adding language in section 1 explicitly providing that the PKPA covers initial visitation determinations); *Bruner v. Tadlock*, 338 Ark. 34, 39-40, 991 S.W.2d 600, 603 (1999) (The purpose of Public Law 105-374 was to "mak[e] explicit" the commands of the PKPA with respect to visitation orders and "hopefully [] eliminate the hassles, obstacles, and delays that too often confront those who have valid visitation

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(Cont'd)

during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition."

Miller-Jenkins, 912 A.2d at 970.

orders and are asking only that federal law be followed," citing 144 CONG. REC. 151, S12941 (daily ed. Oct. 21, 1998).)

- In a further attempt to suggest that this case implicates DOMA, Lisa argues that that law applies to her civil union with Janet, even though a Vermont civil union is not "treated as a marriage," 28 U.S.C. § 1738C, as even Lisa admits with respect to matters such as the application of Vermont's marriage evasion statute. *See* Questions 1, 2 and Petition for Certiorari, p. 26, n. 11.[7]

- Lisa attempts to resurrect her claims that the **Vermont** ruling violates her constitutional rights as a parent. *See* Questions 3, 4. Of course, Lisa was obligated to – and already did – raise that issue in her certiorari petition from the Vermont Supreme Court's ruling, which this Court denied.

- Lisa characterizes Janet as a "legal stranger" to the child, when that is

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[7] Prior case law agrees that legal relationships other than marriages are not covered by DOMA. *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239, 1247-48 (N.D. Okla. 2006) ("Vermont civil union is not 'treated as a marriage' under Vermont law, as that term was meant to be understood when Congress passed DOMA."); *Smelt v. County of Orange*, 447 F.3d 673, 683 and n.26 (9th Cir. 2006) (a California domestic partnership was "not by any means a marriage.").

precisely the opposite of what the Vermont Supreme Court held. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 970. *See* Question 3.

Consequently, having failed to present any compelling reason for a writ of certiorari to be granted, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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(3)

No. 08-306

IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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I. THE VIRGINIA SUPREME COURT'S LAW OF THE CASE DETERMINATION DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO REACH IMPORTANT FEDERAL ISSUES BECAUSE THE DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND.

The Virginia Supreme Court failed to reach the merits of the substantial federal issues in this case by expanding, for the first time in Virginia's history, the law of the *case* doctrine to become the law of the *cases* doctrine. As acknowledged in the opinion below (App. 7a-10a), for nearly a century, Virginia's law of the case doctrine provided that, "'[w]here there have been two appeals in the *same* case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal.'" *Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684 (Va. 1917) (emphasis added). Neither Respondent nor the court cited a single case where the doctrine had been applied to preclude a subsequent appeal on a *different* issue in a *different* case between the same parties. Yet, that is exactly what the Virginia Supreme Court did here. Respondent argues that Virginia's newly-minted law of the *cases* doctrine constitutes an independent and adequate state law ground to preclude this Court from reaching the substantial federal questions presented.

A brief description of the two cases reveals the differences. In the first case, on July 1, 2004, *Petitioner commenced* an action in the Virginia circuit court seeking a declaration that, pursuant to Virginia's artificial insemination statute, Petitioner was the sole

biological parent to her daughter, Isabella (the "Parentage Case"). Respondent moved to dismiss, arguing that the Parental Kidnapping Prevention Act ("PKPA") deprived Virginia of subject matter jurisdiction because Vermont had issued a temporary visitation order two weeks before the Virginia Petition was filed. The circuit court rejected that argument and issued an order declaring Petitioner Isabella's sole biological parent. On November 28, 2006, the Virginia Court of Appeals reversed, concluding that the PKPA deprived Virginia of jurisdiction to issue the parentage determination. That decision became final.[1]

In the second Virginia case, in March 2005, *Respondent commenced* a proceeding to register in Virginia the Vermont visitation determination (the "Registration Case"). Although the Juvenile and Domestic Relations court registered the Vermont order, the circuit court reversed, concluding that Virginia's law precluded granting full faith and credit to the Vermont order. In particular, Virginia's Marriage Affirmation Act ("MAA") provides that

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. *Any such civil union*, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction *shall*

1. See Petition at 6-7 & n.4 for an explanation of why the Virginia Supreme Court dismissed the Petition for Appeal.

> *be void in all respects* in Virginia and any contractual rights created thereby *shall be void and unenforceable.*

Va. Code § 20-45.3 (emphasis added). On April 17, 2007, the Virginia Court of Appeals summarily vacated the circuit court decision in the Registration Case, expressly relying on its November 2006 decision in the Parentage Case. (App. 16a) ("In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case.").

Significantly, after the November 2006 Court of Appeals' decision in the Parentage Case, Virginia's Marriage Amendment became effective. It provides, in relevant part, that

> only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and . . . . This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.

Va. Const. art. I, § 15-A. Nevertheless, the Court of Appeals relied entirely on its November 2006 opinion in the Parentage Case even though that opinion (i) did not consider the effect of the constitutional Amendment on the issue and (ii) expressly stated that it "need not, and did not, decide whether the MAA applies to this case." (App. 45a). The Virginia Supreme Court, in the opinion below, refused to reach the merits in the Registration

Case, concluding instead that the issues decided in the separate Parentage Case somehow were law of the case as to *different* issues raised in the Registration Case.

The Virginia Supreme Court attempted to minimize its drastic departure from the century-old law of the case doctrine by broadly stating: "The two Virginia appeals were part of the 'same litigation' seeking to resolve the single question [of] which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute." (App. 12a). In so doing, the court ignored Petitioner's arguments, based on the different legal issues addressed in the Parentage and Registration Cases, that the two cases were indeed separate cases involving separate issues. In particular, in the Parentage Case, the Court of Appeals explained that "[t]he issue before us is the narrow one of jurisdiction." (App. 46a). That court expressly stated that it did "not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. We do not comment on the constitutionality, viability or breadth of the UCCJEA and the MAA." (App. 46a.). Yet, in the Registration Case, those were the precise questions raised.

While the legal question in the Parentage Case was whether Virginia had jurisdiction under the PKPA to enter a parentage order *after* Vermont had issued a temporary visitation order, the question in the Registration Case was whether Virginia had to give full faith and credit to a foreign custody order in light of Virginia's laws declaring any such order void and unenforceable. The circuit court recognized the pivotal

issue in the Registration Case when it expressly held: "The Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia." (App. 20a). Thus, although the two cases are related, involving the same parties, *they involve different legal issues.* When the Virginia Supreme Court held that the decision in the Parentage Case on the jurisdiction issue was law of the case as to the issue of full faith and credit in the Registration Case, it created a newly-minted law of the *cases* doctrine that, by definition, has not been "'strictly or regularly followed'" by that court. As a result, the opinion below does not rest on an independent and adequate state law ground. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (explaining that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed'"); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("[n]ovelty in procedural requirements cannot be permitted to thwart review"); *cf. Lee v. Kamna*, 534 U.S. 362, 382 (2002) (adequacy determination is a federal question).

Recognizing the weakness of her position, Respondent asserts that Petitioner is merely "quibbl[ing] about the label attached to the court's law of the case determination." (Brief in Opposition at 17). She argues that "had the Virginia Supreme Court viewed the two cases as not part of the same litigation, it could have held Lisa's claims in the second appeal barred by res judicata." (*Id.*). Not only is that point irrelevant to the question whether the court's law of the case determination constitutes an independent and adequate state law ground, but (i) Respondent fails to mention that the court could not have ruled on that

basis because Respondent did not affirmatively plead that defense (*see Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504, 506 (Va. 2003) (" the litigant who asserts the defense of res judicata has the burden of proving by a preponderance of the evidence that the claim is precluded by a prior judgment")), and (ii) res judicata is inapplicable because the two cases do not involve litigation of "the same cause of action" or any part of the same cause of action that could have been litigated. *See Flora, Flora, & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1998).

II. RESPONDENT'S INTERPRETATION OF DOMA RENDERS IT VIRTUALLY MEANINGLESS, REQUIRING ALL STATES TO CONFORM TO THE DECISIONS OF A FEW TO LEGALLY SANCTION SAME-SEX RELATIONSHIPS.

Contrary to Respondent's argument, the decision below to give full faith and credit to a child custody order arising out of a same-sex civil union based on that court's interpretation of the PKPA is *not* one of an unanimous line of cases reaching the same result, but is instead a decision of first impression with nationwide significance.[2] The fact is, this is the first case in the nation to address the question of whether, in light of the federal Defense of Marriage Act ("DOMA"), the PKPA's full faith and credit requirement mandates that a state ignore its

2. See Brief in Opposition at 2 ("Petitioner fails to cite any case with a contrary holding, and indeed the case law is unanimous that (1) the PKPA does not permit a state to invoke public policy to ignore the statute's terms; and (2) DOMA is not implicated in the absence of a marriage.").

marriage laws and state constitution expressly prohibiting recognition of same-sex relationships.[3] The two cases Respondent cited are inapposite to her position that a state cannot assert a public policy defense to the PKPA's full faith and credit requirement. *See* Brief in Opposition at 19 & n. 5. In one case, the Arkansas Supreme Court concluded that Arkansas was required to give full faith and credit to a Mississippi visitation order granting visitation rights to a putative father even though the paternity determination was inconsistent with Arkansas law. *See Perez v. Tanner*, 965 S.W.2d 90, 92 (Ark. 1998). In the other case, the Michigan Supreme Court held that the PKPA required Michigan to give full faith and credit to an Iowa decision to return custody of a baby girl to her biological parents in Iowa after a Michigan couple's attempt to adopt the child failed. *In re Clausen*, 502 N.W2d 649 (Mich. 1993).

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3. Respondent attempts to argue, in a bullet point at the conclusion of her Brief, that the Vermont orders granting her parental rights and responsibilities do not arise out of the same-sex civil union. Vermont's conclusion that Janet is a parent is a legal fiction principally resting on the fact that Janet and Lisa were in a civil union at the time Isabella was born *in Virginia*. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) ("[m]any factors are present here that support a conclusion that Janet is a parent, including, ***first and foremost***, that Janet and Lisa were in a valid legal union at the time of the child's birth;'" "'the couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage'"(emphasis added)). Even clearer is the trial court's holding that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." *Miller-Jenkins v. Miller-Jenkins*, no. 454-11-03, Vt. Fam. Ct. Nov. 17, 2004 Order, at 11.

The significant difference between the issue presented here and that of all the other cases that have concluded that there is no public policy exception to the PKPA is that this case implicates the express public policy exception codified in the federal DOMA.[4] Under DOMA, no state is required to give full faith and credit to any rights or claims arising from a same-sex civil union that is treated as marriage.[5] In passing legislation and a constitutional amendment, Virginia exercised its right to declare void and unenforceable any rights or claims arising from same-sex civil unions treated as marriage.[6]

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4. It also directly implicates federalism concerns where a federal statute dictates to a state how to define marriage and family – matters of traditional state concern. *See* Petition at 15-16.

5. Respondent incredibly suggests that DOMA is inapplicable to Vermont same-sex unions. (Brief at 2). Vermont law states that "parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage . . . ." 15 V.S.A. §§ 1204(a). With respect to children born during the civil union, Vermont law states that the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse becomes the natural parent during the marriage." 15 V.S.A. §§ 1204(f). Plainly, Vermont civil unions are same-sex relationships treated as marriage.

6. As of November 2008, twenty-nine other states have similarly passed constitutional amendments preserving the traditional meaning of marriage as the union of one man and one

(Cont'd)

Confused, and contrary to the statute's express language, the Virginia Court of Appeals concluded that DOMA carved out an exception to full faith and credit for every type of right or claim arising from a same-sex civil union that is treated as marriage **except** for child custody or visitation orders.[7]

This Court should grant the Petition to resolve the important federal questions concerning the proper interpretation of the PKPA and DOMA to prevent further interstate conflicts in matters of traditional state concern. Absent intervention by this Court, additional litigation is inevitable. Because Vermont, Massachusetts, and California do not have residency requirements before a same-sex couple can enter into a civil union (Vermont), domestic partnership treated as marriage (California) or same-sex marriage (Massachusetts), the

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(Cont'd)

woman. Those states are: Alaska, Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin.

7. Respondent attempts to bolster her argument that the PKPA's full faith and credit requirement trumps the exception codified in DOMA by pointing out that the PKPA was amended in 1998 to clarify that it applied to visitation as well as custody determinations. It is not surprising that Congress did not amend DOMA at that point to clarify any confusion concerning the interplay between PKPA and DOMA because at that time, and indeed not until this case, there was no reason to suspect that courts would fail to properly apply the exception codified in DOMA. *See* Petition at 15-18 (explaining the reasons for passing, and intended scope of, DOMA).

precise federal question raised in this Petition will proliferate. *See, e.g., A.K. v. N.B.*, no. 2070086, 2008 WL 2154098, at *4-5 (Ala. Civ. App. May. 23, 2008) (relying on *Miller-Jenkins* to conclude that PKPA deprives Alabama of jurisdiction to entertain parentage action by biological mother after California declared former same-sex partner to be a parent to the biological mother's child and entered a visitation determination).

III. DECLARING A THIRD PARTY TO BE A PARENT TO PETITIONER'S BIOLOGICAL CHILD INFRINGES PETITIONER'S PARENTAL RIGHTS.

Respondent does not even attempt to argue that the Vermont decision declaring Respondent, a legal stranger, to be a parent to Petitioner's biological child is anything other than a violation of Petitioner's fundamental parental rights and as a result, Virginia should not be forced to give it full faith and credit. Instead, Respondent relies solely on her position that once the Vermont Supreme Court decided the matter – rightly or wrongly – all other forty-nine states must give the decision full faith and credit regardless of how patently unconstitutional it is. *Cf. Weidner v. W.G.N.*, 371 N.W.2d 379, 381 (Wis. Ct. App. 1985) ("A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. 'We see no reason to accord full faith and credit to a [court-approved paternity agreement] obtained in violation of equal protection.'") (citations omitted).

The Vermont order treating Respondent as a parent to Isabella failed to comport with even the minimal procedural guarantees required by the "some special weight" standard articulated by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000). Vermont declared a legal stranger to be a parent over the objections of the child's fit biological parent without affording *any weight whatsoever* to the parent's preferences. Unfortunately, Vermont's decision is just one among the significant conflict that exists among the state courts regarding the fundamental rights of fit parents to prevent a court from granting parental rights in favor of a legal stranger. *See* Petition at 22-31. Confused over the PKPA's full faith and credit requirement, the Virginia courts altogether failed to even reach the parental rights argument and, more specifically, whether Virginia was required to give the unconstitutional order full faith and credit.

The incorrect PKPA interpretation also infringes upon Virginia's sovereignty given Virginia's consistent refusal to grant *visitation* rights to third parties over parental objection. *See Williams v. Williams*, 256 Va. 19, 22, 501 S.E.2d 417, 418 (1998) (relying on this Court's precedent, holding that a third party – whether a grandparent or stepparent – cannot constitutionally be awarded *visitation* over the objection of the fit, biological parent absent proof that "actual harm to the child's health or welfare" will occur without such visitation); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (denying visitation rights to former same-sex partner).

In light of the growing conflict and confusion among the states concerning parental rights of fit biological parents *vis a vis* third parties, this Court should address and resolve the conflict.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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